Nos. 66 and 67.

Brief of Floyd Hughes for the Plymothian

OCT 25 1897
JAMES H. McKENNEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1897

Filed Oct. 26, 1897.

No. 66

THE PORT OF PLYMOUTH STEAMSHIP COMPANY (LIMITED), PETITIONER FOR LIMITATION OF LIABILITY, AS OWNER OF THE S. S. PLYMOTHIAN

Appellant in this Court

against

THE CANTON INSURANCE COMPANY (LIMITED), AND OTHERS, UNDERWRITERS ON CARGO, AND JOHN McINTYRE AND OTHERS, OWNERS OF THE STEAMSHIP VICTORY, CLAIMANT

Appellees in this Court

No. 67

JOHN McINTYRE AND OTHERS, PETITIONERS FOR LIMITATION OF LIABILITY, AS OWNERS OF THE STEAMSHIP VICTORY

Appellants in this Court

against

CANTON INSURANCE COMPANY (LIMITED), AND OTHERS, UNDERWRITERS ON CARGO, AND PORT OF PLYMOUTH STEAMSHIP COMPANY (LIMITED), OWNER OF STEAMSHIP PLYMOTHIAN, CLAIMANTS

Appellees in this Court

BRIEF FOR PLYMOTHIAN

FLOYD HUGHES

Of Counsel for Plymothian

INDEX.

PAGE

STATEMENT 1

POINTS:

I. The *Victory*, passing Craney Island, was not on the eastern edge of the main ship channel, but was at least in mid-channel, if not further to the westward 7

II. The *Victory* was not forced to the eastern edge of the channel by passing vessels 10

III. The *Victory* being in mid-channel, if not to the westward at Craney Island, and the *Plymothian* in mid-channel, or to the eastward, off buoy 9, each should have ported and passed port to port 13

IV. The *Victory* did not give the first signal, but the *Plymothian* did, which was not answered by the *Victory* until twice repeated, and then by a cross-signal 17

V. The *Victory* was under excessive speed, and did not promptly stop and reverse 19

The *Victory's* speed 21

Answer to Ralli Brothers' Libel, R., 436, 439 24

Contradictions of *Victory's* master and pilot 25

THE NAVIGATION OF THE "PLYMOTHIAN" 30

VI. The *Plymothian* did not cross over to the western side of the channel, but moved down the eastern side of the channel under a port helm, her proper course 30

VII. The *Plymothian's* whistle was not defective 38

VIII. The *Plymothian* signaled first and properly 40

IX. The *Plymothian* was moving under moderate speed, and on the first indication of *Victory's* change of course, promptly stopped and reversed, with headway at collision entirely overcome 40

The *Plymothian's* helm 52

The Log 53

PAGE

X. Result of the decision of Circuit Court of Appeals much more disastrous to owners of *Plymothian* than contemplated by that Court 56

XI. The steamship *Plymothian*, if at fault in the collision, is freed from responsibility to her cargo owners by the express provisions of her bills of lading 58

XII. The decision of the Circuit Court of Appeals should be reversed and the decision of the District Court restored in its entirety 61

Supreme Court of the United States,

OCTOBER TERM, 1897.

THE PORT OF PLYMOUTH STEAMSHIP COMPANY (LIMITED), Petitioner for limitation of liability, as owner of S. S. *Plymothian*,
Appellant in this Court,

AGAINST

THE CANTON INSURANCE COMPANY (LIMITED), and others, Underwriters on Cargo, and JOHN MCINTYRE and others, owners of the Steamship *Victory*, claimants,
Appellees in this Court.

No. 66.

JOHN MCINTYRE and others, Petitioners for limitation of liability, as owners of the Steamship *Victory*,
Appellants in this Court,

AGAINST

CANTON INSURANCE COMPANY (LIMITED), and others, Underwriters on Cargo, and Port of Plymouth Steamship Company (Limited), owner of Steamship *Plymothian*, claimants,
Appellees in this Court.

No 67.

BRIEF FOR PLYMOTHIAN.

On the afternoon of Thursday, November 12, 1891, a collision occurred on the eastern edge of the main ship channel of the Elizabeth River, about half a mile below

Lambert's Point, between the British steamship *Victory*, bound up the river to the port of Norfolk, Va., light, for cargo, and the British steamship *Plymothian*, which, bound on a voyage from Galveston, Texas, to Liverpool, with a cargo of 3,682 bales of cotton, had that morning put into Lambert's Point for bunker coal, and was proceeding to sea. In the collision aforesaid the steamship *Victory* was injured to some extent forward, and the steamship *Plymothian*, struck by the bow of the *Victory* on her port side, was so seriously injured that she, in the course of a few moments, with her said cargo, sank in shoal water on the eastern side of the said Elizabeth River.

On November 14, 1891, a libel was filed by S. Elcoate, master of the steamship *Victory*, against the said *Plymothian*, in the District Court of the United States for the Eastern District of Virginia, for damages sustained by the *Victory* in said collision; on November 27, 1891, a libel was filed by the Canton Insurance Company, Limited, *et als.*, owners and underwriters of the cargo of cotton on board the *Plymothian*, and damaged to the extent of $71,000, against both steamships. Answers to these libels were duly filed. On December 3, 1891, the owners of the steamship *Victory* filed their petition for limited liability; and on the same day the Port of Plymouth Steamship Company, claimant of the steamship *Plymothian*, filed its petition for limited liability. The preceding libels were then merged in these two limited liability proceedings; answers and petitions were duly filed thereafter by the proper parties, and the causes proceeded to hearing. It was ascertained by the Commissioner to whom the matter of damages was referred, that, in the collision aforesaid, the steamship *Plymothian* was injured to the extent of $41,684.12, the cargo of cotton to the extent of $71,420.97, and the steamship *Victory* to the extent of $14,363.80 (all of said sums bearing interest from December 1, 1891).

The steamships in said proceedings were duly appraised and bonded, the *Victory* in the sum of $67,500 and the *Plymothian* and her earned freight (less agreed salvage) at $40,221. The above causes were heard by the District Judge in June, 1894, and in September, 1894, were decided

by him, he holding the steamship *Plymothian* without fault in the said collision and the steamship *Victory* solely at fault. On the 30th of October, 1894, the District Court entered its decree in these causes to the above effect, giving a judgment against the bond of the *Victory* in favor of the petitioner for $24,478.78, and of the cargo owners in the aggregate for $41,882.74, and interest from October 30, 1894, being their respective *pro rata* recoveries on the *Victory's* bond of $66,361.52.

From this decision the cargo underwriters and the claimants of the *Victory* appealed to the U. S. Circuit Court of Appeals for the Fourth Circuit and that Court heard argument in these causes in February, 1895, and on the 28th day of May, 1895, filed its decision affirming the District Judge in his finding as to the fault of the *Victory*, but modifying the decree in respect to the *Plymothian*, holding that she had not adopted the necessary precautions for avoiding the collision, and decreeing full recovery to the owners of her cargo, first, against the bond of the *Victory* to its entire amount, and then over against the bond of the *Plymothian* for the remaining amount due them on their entire loss. The opinions of the District Court and the Circuit Court of Appeals appear in the record filed herewith at folios 447-458 and 498-504 respectively. Rehearings were asked and denied, but the mandate was suspended until November 1, 1895, to give opportunity to make application to this Court for writs of *certiorari*, which were duly granted.

Upon the trial the following facts appeared and were in substance so found in both courts: The two steamships came into collision at 4.14 P. M. on November 12, 1891, on a clear afternoon, close upon black buoy No. 7, which marks the eastern edge of the 18-foot channel of the Elizabeth River, between Lambert's Point and Craney Island Lighthouse. The charts filed in these causes, the originals of which are before the Court, show the following courses and distances: From Lambert's Point Lighthouse to buoy 9 is 350 yards N. W. by W.; from buoy 9 to buoy 7, the place of collision, 767 yards due north; from buoy 7 to Craney Island Lighthouse, 1,200 yards N. ½ E.; width of channel at buoy 9, 450 yards; at buoy

7,475 yards; at Craney Island, 250 yards. The range of mid-channel, from a point opposite Craney Island Lighthouse to a point opposite buoy 9, is S. ½ W.; the distance about 1⅛ miles.

The steamship *Victory*, Elcoate, master, with a crew all told of 31 men, was an iron ship of 1,774 net tonnage, 338 feet long, 38½ beam, 17 feet aft, 13 feet forward, of draught, and was bound up the river to Norfolk, light, with 400 tons of water ballast and 550 tons of coal.

The *Plymothian*, Mardon, master, with a crew, all told, of 21 men, was an iron ship of 1,016 net tonnage, 260 feet long, 16 feet draft, with a cargo of 3,682 bales of cotton, and was proceeding down the river from Lambert's Point, bound to sea.

Each steamship had its captain on the bridge, with a Virginia pilot in charge of navigation. Just as the *Plymothian*, having left Lambert's Point pier, had rounded buoy 9, and had straightened out on her course down the eastern side of the channel, the *Victory*, in coming up from Hampton Roads, was just abreast of Craney Island Lighthouse. This was at 4 P. M.; the vessels were then 1⅛ miles apart, the *Victory*, which had been moving 10 miles an hour, is then alleged to have slackened her speed to some 6 or 7 miles an hour, and the *Plymothian* was moving about 4 miles an hour. The tide was flood, running about 2 miles an hour. The *Plymothian* kept well to the eastern side of the channel on a ported helm.

The weight of evidence shows the *Victory* off Craney Island to the westward of mid-channel, though her navigators claimed her to be on the eastern side. Several of the disinterested witnesses place her close over to the western edge of the channel. Upon rounding buoy 9 and straightening out on her course down the eastern side of the channel, the *Plymothian* gave a long whistle, indicating that she would pass the *Victory* port to port, repeating it afterwards twice. It was some time before the *Victory* answered, which she at length did with a cross-signal of two whistles, and, as admitted by her pilot, Nelson (Record, pp. 331, 340), when half-way between Craney Island and buoy No. 7.

When the *Plymothian* blew this one signal whistle the

third time, she was thus promptly answered by a cross-signal of two whistles from the *Victory*, the *Victory* having in the meantime directed her course from mid-channel to the eastern side, and the *Plymothian* being headed down the river close to the eastern edge of the channel.

The steamer *Plymothian* thereupon blew alarm signals and at once backed her engines full speed, continuing the same until the collision. The heavy preponderance of testimony shows, as found by the District Judge, that at the collison, which occurred shortly thereafter, the headway of the *Plymythian* was entirely overcome, and it is possible that she attained a slight backward movement. The *Victory* also blew alarm whistles and reversed her engines, but the headway of the *Victory* was not overcome and she ran into the *Plymothian*, striking her port side with such force as to render immediate beaching necessary.

At the time of the collision the *Plymothian's* bow was touching buoy No. 7, on the eastern edge of the channel, and in another moment she would, under her port helm, have grounded. The angle of collision was about 60 degrees.

The main allegations of the *Victory's* navigators, as shown by her pleadings, were:

(1) That the *Plymothian* on coming out from Lambert's Point pier, crossed over to the western side of the ship channel, and then recrossed to the eastern side, when the collision occurred. (2) That she had defective whistles. (3) That she failed to stop and reverse when danger of collision arose. (4) That the *Victory* herself was on the eastern side of the channel, and was prevented from taking the western side by several steamers and schooners which were in the river. On all of these charges the District Judge found strongly against her, a finding which was followed by the Circuit Court of Appeals, save as to the third charge.

The allegations of the *Plymothian* against the *Victory* were:

(1) That the *Victory* was in mid-channel at Craney Island, and failed to keep in mid-channel or on the west-

ern side, as the rules of navigation directed. (2) That she failed to answer the first signal of the *Plymothian* of one blast, for some time, and then replied by a cross-signal. (3) That she then starboarded her helm and came over to the eastern edge of the channel, down which the *Plymothian* was proceeding, thereby causing the collision. (4) That she was moving at too rapid a rate of speed, and failed to stop and reverse as the law prescribed. All of which charges were fully sustained by a large preponderance of evidence, and by the findings of both the District Court and the Circuit Court of Appeals, the latter holding her faults so gross as to be almost willful.

On behalf of the *Victory*, her master and eight of her crew were examined by deposition: the depositions of three witnesses from the S. S. *Princess* and that of a negro bargeman named Swaine, were also taken; and on the trial the pilot Nelson, a boiler-maker named Wood, a tugboat captain named Pratt, lighthouse keeper Martin, real estate agent Page and clerk Tweddle were examined.

Counsel for the *Plymothian*, examined on her behalf the master and ten of her crew by deposition, and introduced before the Court, at the trial, the pilot Henley, ten disinterested eye-witnesses of the collision, a marine surveyor and a shipwright; these disinterested eye-witnesses are tugboat and steamboat men who saw the collision from all points of the compass, whose daily lives are spent on these waters and who are thoroughly acquainted with the location of the accident.

This case, therefore, differs from the ordinary collision case in that such a large amount of disinterested testimony, from witnesses known to the Court and thoroughly conversant with these waters and the rules of navigation, has been obtained.

The evidence is most voluminous and conflicting. Such the District Court has found it to be, and counsel for the *Victory* in the lower Court, in his brief, has stated it thus strongly:

"The testimony is in hopeless conflict as to the facts of the collision, the position taken by each vessel being diametrically opposed, and a multitude of witnesses outside

of the crews of the vessels have been also examined, whose testimony is as conflicting as that of the crews themselves."

In view of the fact that, since the decisions of the lower Courts in this case, this Court has, in the case of the *Delaware* (161 U. S., 457), held that waters such as those in which this collision occurred, were not embraced within the Act of 1885, but were subject to the provisions of the United States Revised Statute, Section 4233, and to the regulations of the Supervising Inspectors, it will be necessary to go more fully into a discussion of the facts of the case than otherwise would be called for. This discussion will be first directed to the navigation of the *Victory*, whose faults have been deemed gross by both the lower Courts, and afterwards to the navigation of the *Plymothian*.

I.

The *Victory*, passing Craney Island, was not on the eastern edge of the main ship channel, but was at least in mid-channel, if not further to the westward.

Notwithstanding the statements in the log of the *Victory*, the allegations in the various pleadings filed from time to time in her behalf, and the unqualified and positive statement of those of the *Victory's* crew who gave testimony on this point, that she passed Craney Island lighthouse, on the eastern side of the channel, we contend that the great preponderance of testimony is to the contrary, showing that she passed the lighthouse certainly as far west as mid-channel, if not well over to the western edge.

Of the large crew of thirty-one men on the *Victory*, only nine are produced to give testimony on her behalf. Of these, three are from the engine-room and know nothing of what occurred on deck. Two others, Scott and Stewart, testify as to nothing occurring before the ex-

change of signals, so that only four of this large crew gave testimony on what must be considered one of the main facts in dispute.

Only Candish (R., 35-45); Gilbert (R., 61-2); Middleton (R., 101-2), and Elcoate (R., 132-141), place the *Victory* passing Craney Island on the eastern side of the channel, all stating that she was forced there by passing steamers; but two out of these four, on cross examination, show that she could not have been east of mid-channel, Candlish (R., 34), stating that the *Victory* had to starboard her helm to avoid the schooners, which were about mid-channel (see also R., 46, as to passing second steamer, and R.,47, as to passing third steamer), which is corroborated by Gilbert (R., 69), stating that the *Victory* had to starboard her helm in passing the third steamer, which was west of mid-channel. It is true Nelson, the pilot (R., 330), follows these four, but he says he took the east side, not because he was forced there, but because he knew the steamers he was meeting were going to take the Swash Channel, and he wanted to give them room.

Of the *Victory's* disinterested testimony, Wigham (R., 21), does not state positively her position at Craney Island; Page (R., 316), did not see her until she was above Craney Island; Pratt (R., 307-8), does not place her until after she passes the lighthouse, and Martin (R., 320), put her close on the eastern side. Martin was the witness who sees the *Victory* all the way from Boush's Bluff lightship (R., 320, 321), and swears she moved close upon the eastern side of the channel, all the time, *heading straight for the pier* where he was standing. An examination of the chart shows that such a course would have put her aground before she could get to Craney Island. His testimony refutes itself.

On the other hand, all but one of the crew of the *Plymothian* who testify on this point, Lyons (R., 210); Hendema (R., 228); Baird (R., 231, 236); Wood (R., 239), place the *Victory* on the *Plymothian's* port bow, and, of course, necessarily, not on the eastern side of the channel, no matter where the *Plymothian* was, whether on the east side, middle or west side. Schroder (R., 203), don't place her until after signals were given, and then as throwing over

from west to east, about ahead. Before that, of course, the necessary inference must be that she was in mid-channel or west of it.

Mardon, master (R., 264, 270), and Henley, pilot (R., 361, 363, 366, 368), place her in mid channel, as does the answer. Also Etheridge (R., 354, 358, 359); and Harrison (R., 399); and Wynne (R., 411). But Brown, the keeper of Craney Island light (R. 346, 348), and Goodwin (R., 375), place her close over on the western side of the channel, which is singularly corroborated by the testimony of Mate Channel, then on the *Olive* (R., 428, 429), and Captain Harney of the *Luray* (R., 433), who both state positively that they passed the *Victory* port to port, Channel saying that she was just as close to the west side as she ought to be—just abreast Craney Island. This is further proved by the mate's log of the *Victory*, reciting that upon blowing the two whistles to the *Plymothian*, a schooner close aboard forced them "*to keep on a starboard helm.*" If the *Victory* was within thirty or forty feet of the eastern shore in passing Craney Island, and a schooner forced her to *continue* a starboard helm, she would have been ashore long before arriving at buoy No. 7. She must have been either in mid-channel or west of it, and then have come over under a starboard helm in order, as Captain Nelson puts it, to give the *Plymothian* room, with reference to which vessel he was directing his course, as he states (R., 337-9).

The preponderance of testimony is decidedly in favor of our contention on this point, and so the District Judge decided, holding that the *Victory*, at Craney Island Light, was at mid-channel (R., 449); repeating it (R. 451).

The opinion of the Circuit Court of Appeals (R., 499), also places her about mid-channel or possibly a little to the eastward, but does not follow the pleadings of the *Victory* in placing her on the extreme eastern edge.

II.

The *Victory* was not forced to the eastern edge of the channel by passing vessels.

Recognizing the hopelessness of their case, should the *Victory* be placed in mid-channel at the first interchange of signals, the collision happening on the eastern side, her counsel attempt to transpose this steamship to the eastern edge of the channel passing Craney Island and up to the collision point, and endeavor to justify such a position by saying that she was forced there by passing vessels.

This excuse is first given in their log, and taken up and repeated time without number in their pleadings.

In attempting to prove this statement, however, an utter failure is made. Their pretense is that, commencing below Craney Island, the channel is from that point up to the collision regularly notched with vessels, each forcing the *Victory* further and further to the eastward, until finally at the collision she is right on the east bank. These vessels consist of three steamers and three schooners. The schooners may be dismissed with a word, when all of the crew testify that they were all to the eastward of mid channel, save Nelson, who states that only one was, he, the navigator, never noticing the others, which were on the western side (R., 336, 337), nor navigating with reference to *them*, but to the *Plymothian*, a glaring discrepancy; and the further remark, that an analysis will show not only that the statements of the witnesses as to the schooners are in hopeless conflict, one with the other, but show that, admitting that the *Victory* was on the east side, she could easily have passed over to the west side, either between the last steamer and the first schooner, or the first and second schooners, or between the second and third schooners.

As to the passing steamers, no disinterested witnesses testified for the *Victory*, and again only four out of a crew of thirty-one.

Candlish (R., 34, 46), states they passed the first steamer half a mile below Craney Island, the second at the light-

house, a little west of mid-channel, and the third one-third of the way to the buoy. No difficulty here in passing to the westward between the first and second or second and third steamers. Gilbert states he passed three steamers (R., 61), two before passing Craney Island and one after, starboard to starboard, which forced him on the east side (R., 68, 69), the first half a mile, the second a quarter of a mile, below, and the third just above Craney Island. No difficulty here in passing to westward.

Middleton (R., 102), contradicts all the others by placing the first steamer below Craney Island, the second steamer two lengths behind the first, off Craney Island, and the third, one length behind the second and above Craney Island. These positions, if proved, would, of course, prevent the *Victory* from going to westward; but this is the witness whose statements as to schooners are absolutely ridiculous, and these may be so taken also, inasmuch as they are so at variance with his own captain and crew.

Elcoate (R., 132, 145, 146), places the first steamer half a mile below Craney Island; the second just off, and the third a quarter of a mile above, estimates which allow the *Victory* ample moving space between the first and second and the second and third steamers. No forcing to eastward here.

Nelson, the pilot, the navigator (R. 330), frankly admits that he was not forced over by these steamers, thereby flatly and hopelessly contradicting all the preceding witnesses, including the captain, but that he went there voluntarily in order for them to take the Swash Channel.

Taking their own testimony solely, none of the witnesses prove the contention that these steamers forced the *Victory* there, and, as a matter of fact, she was not there, as is conclusively shown by Captain Harney, of the *Luray* (R., 433), and Mate Channel, of the *Olive* (R., 428) (two of these three steamers), both of whom state positively that they passed port to port.

The opinion of the District Court, as to the weight of testimony on this alleged forcing to the eastern side of the channel, is given in no uncertain language. He says (R., 450):

"The weight of testimony is that the western part of the channel, as far at least as abreast of buoy 7, was free from obstruction. The *Victory's* own witnesses place such schooners, as that steamer met after passing Craney Island, east of mid-channel, in positions not only suggesting to her to take the western side, but forbidding her, under the rules, to take the eastern side. Moreover, the claim of the *Victory's* crew that each of three steamers, which she met in coming from Hampton Roads up Elizabeth River, gave her two whistles and forced her over to the eastern side of the channel, is contradicted flatly by the officers of two of those steamers, and by all the witnesses in the case, who testified that when she had reached Craney Island she was in mid channel. The preponderance of testimony in favor of her being in this last named position is so great as to be *conclusive of the fact.*"

This finding of fact is apparently followed by the Circuit Court of Appeals, for nowhere is found in its opinion, as delivered by Judge Simonton, any expression to the effect that the *Victory's* navigation, after passing Craney Island, was hampered in the slightest degree by passing vessels, either steam or sail.

The counsel for the *Victory* will doubtless attempt to explain away the cutting effect of the testimony of Harney and Channel by saying that numerous steamers were passing down the river at the time, and while the *Luray* and *Olive* may have passed the *Victory* port to port, yet she passed three other steamers starboard to starboard.

The record does not disclose any such stream of vessels passing down the river at this hour, as is called for by this explanation.

All the witnesses, as does the log, speak of passing only three river steamers, which prove, on investigation, to be the *Louise*, *Luray* and *Olive*.

It is true that Elcoate, in his remarkable answer to the libel of the cargo owners (R., 436), filed after the depositions of himself and crew were taken, attempts to introduce a tug, an attempt entirely unjustified by all the evidence in the case, for there is not a word of testimony in this large record to sustain this allegation. In this same answer Elcoate also introduces the steamer *Accomac*, which

he had not mentioned in his testimony then taken, and which is spoken of by only one witness of the many examined, seaman Gilbert (R., 74), who thinks that one of the steamers, which one he does not know, was named *Accomac*. This single reference is insufficient to overcome the effect of the testimony of Channel and Harney; it is most damaging to the *Victory*, not only on this point, but also on her position in the river at Craney Island, for, how ever many other steamers she may have passed, when she passed the *Luray* and *Olive* she was at least in mid-channel, if not to the westward. Placing her there, the whole theory of her case as shown by her pleadings, the whole fabric of her defense, falls. She was not on the eastern edge of the channel at Craney Island; she had not then been, nor was she afterward, forced there by other vessels. Her position was undoubtedly that described by the District Judge, who says (R., 451):

"I consider it proved beyond reasonable doubt that the *Victory* and *Plymothian*, at 4 P. M. on the afternoon under consideration, one of them in mid-channel abreast of Craney Island Light, and the other in mid-channel abreast of buoy 9, were free to proceed according to the rules of navigation governing them on the occasion, on their respective courses, without obstruction or let or hindrance of any kind."

III.

The *Victory* being in mid-channel, if not to the westward, at Craney Island, and the *Plymothian* in mid-channel, or to the eastward, off buoy 9, each should have ported and passed port to port.

The charts show the channel line from Craney Island to buoy 9 to be straight, the range being about N. ½ E. and S. ½ W.; and the distance about a mile and an eighth.

It will be conclusively shown, in our subsequent discussion, that the *Plymothian*, coming out from Lambert's

Point, was never further to westward than mid-channel, and was off buoy 9 about the time that the *Victory* was below Craney Island.

Such being the situation, it is submitted that it was the duty of each vessel to follow the natural law and keep to the right.

It being conceded that Rule 21 of the Act of 1885 is not applicable, it is no less strongly urged here, as it has been in the two lower courts, that both under the local custom of the river, and under Section 4233 and the pilot rules, it was the duty of these vessels to sound one whistle and pass port to port.

The fact that it is an established custom, and was recognized as such by the navigators of the *Victory* on this occasion, may not be an unimportant element in the case at bar.

Mardon, the master of the *Plymothian*, says that in navigating narrow waters "ships coming up go one way and going down they keep the other. The *Victory* was on the east side when she should have been on the west" (R., 268). "From the time she got under way in Hampton Roads, up to Lambert's Point, she should have kept on the west side of the channel" (R., 268; see also R., 277, 278, 280; Henley, R., 372; Tweddle, R., 325, 326), which custom was known to Elcoate, the master of the *Victory*, as a rule (R., 162).

The river steamers appear upon the proofs, though contrary to the contention of the *Victory*, to have obeyed this custom and passed the *Victory* port to port, going down the starboard side of the channel, though not bound, by their light draft, to the channel limits; and the schooners, also, in obedience to this custom, were holding to the starboard side of the channel; and such, indeed, was the understanding of the counsel who prepared the *Victory's* pleading, and examined her crew and navigators, as clearly disclosed in the pleadings and proofs. Indeed, the strongest proof that the *Victory* was wrong in taking to the eastern side of the channel is found in the excuses which he immediately began to offer for being on that side. In her log, supposed to be written the night of the collision, she begins her defense on this point. In all of her plead-

ings she states she proceeded on the eastern side of the main ship channel, in order to avoid certain vessels which were seen approaching (R., 1, 19, 436).

In her proofs, the most elaborate justification is attempted, which we have shown to have signally failed, and finally her master admits expressly that, where practicable, it was his duty to go to the right (R., 152).

However the local custom, and whatever its bearing on this case, we earnestly submit that the vessels being in the situation above described, it was the duty of each, under the statute, to blow one whistle, port the helm and pass port to port.

The chart shows the channel between Craney Island and buoy 9 to be straight, for vessels of the draft of the *Victory* and *Plymothian*. Reference may be had by counsel for *Victory* to a chart filed by the District Judge, in which is shown a dotted line giving the course a vessel should steer coming into Norfolk Harbor, starting from mid-channel at Craney Island and gradually approaching the eastern edge at buoy 9. The navigation of the river is now no more regulated by a dotted line drawn by an engineer on a government chart than by the International Rules; nor is that chart intended exclusively for *incoming* vessels. Outgoing steamers have some rights in the river, and such a line must be disregarded whenever other vessels come within signal distance and the regular rules of navigation become operative. For what purpose the learned Judge filed this chart does not appear. Certain it is, however, that he introduced it for no such purpose as this; and equally certain is it that the Government contemplated no such use, for they have abolished that issue of the Norfolk Harbor Chart, and their official issues no longer contain such lines.

The channel being straight, and each vessel being in mid-channel, a situation the least favorable under the evidence for the *Plymothian*, it is submitted that their navigation should have been controlled by Rule 18 of Navigation, which reads:

"If two vessels under steam are meeting end on, or nearly end on, so as to involve risk of collision, the helms of both shall be put to port, so that each may pass on the port side of the other."

This rule is enlarged and explained by Supervising Inspector Rule No. 1 (R. 344) and by situation One; the vessels being head on, or nearly so, should have sounded one whistle, ported and passed port to port. This the *Plymothian* attempted to do, as we shall presently show, and the failure of the *Victory* to respond to her signal, her finally giving a cross-signal and starboarding, was the proximate cause of the collision which promptly ensued.

It is contended that Starboard Hand Rule No. 19 should apply, because the *Victory*, moving up the river from Boush's Bluff, was on the starboard side of the *Plymothian*, lying at Lambert's Point pier, and moving thence out into the river at buoy 9.

We cannot suppose that serious attention will be paid to such a position; as well contend that the *Victory* at anchor in Hampton Roads at 3.30 was on the starboad side of the *Plymothian*, coaling at Lambert's Point pier.

The *Velocity*, 3 P. C., 44.

The *Ranger* and the *Cologne*, 4 P. C., 519.

The rules regulating the navigation of these vessels meeting each other cannot have applied earlier than when the incoming vessel reached Craney Island and the other passed buoy 9; they were then at least a mile apart, and for the first time assumed rights and obligations with respect to each other.

Taking the most unfavorable position to the *Plymothian*, they were in mid-channel, head on, and directly in the first situation.

An inspection of the testimony will establish, however, as we shall presently show, that while the *Victory* was in mid-channel at Craney Island, if not to the westward, the *Plymothian* was straightened down the river near buoy 9 and well over on the eastern side. The steamers were, therefore, on each other's port bow, and in the third situation of the pilot rules (R., 432).

Whether in the first or the third situation, the obligation to blow one whistle and port the helm was no less imperative, and the flagrant disregard of this obligation on the part of the *Victory* caused the collision.

While the lower courts have laid some stress on the operation of the International Rules, the facts as found by

both courts clearly bring the vessels within the foregoing pilot rules; they control with no less force and effect than the International Rules, were they operative, and their disregard has been attended with no less unfortunate result.

IV.

The *Victory* did not give the first signal, but the *Plymothian* did, which was not answered by the *Victory* until twice repeated, and then by a cross-signal.

It is practically a conceded fact that when the *Plymothian* was passing buoy No. 9 the *Victory* was not further up the river than Craney Island Lighthouse.

Bearing this in mind, the fact of the first signal being sounded by the *Plymothian*, and not by the *Victory*, stands apparent, even on their own testimony. Of the nine witnesses who testify from the crew of the *Victory*, Stewart and Scott do not testify as to this point, nor do the three witnesses from the engine-room. Candlish places this signal when passing the first schooner (R., 48), and some distance south of Craney Island So does Gilbert (R., 71), and Middleton (R., 103); and Elcoate (R., 135); when only five lengths from buoy 7, and off the first schooner (R., 147), only 500 yards north of buoy No. 7, and 700 yards south of Craney Island.

Nelson (R., 331), 340, places the *Victory* half way between Craney Island and buoy 7 when her first signals were given.

Of their disinterested testimony, neither Swain, Pratt, Page, Martin nor Tweddle speak at all on this point.

Wigham (R., 21), places the *Plymothian* well past buoy 9 when the *Victory* sounded her two whistles. South (R., 29), places the *Victory* only four or five cables' length from buoy 7, and Rankin (R., 31), places her only a quarter of a mile from the *Princess* at this time. It cannot be doubted, then, that she was more than half way between the light-

house and buoy 7 when her first signals were given, and from their own testimony.

On this question we produce not only all of our deck testimony, with positive statements, giving locality, but numerous witnesses from every quarter, who hear all the *Victory's* whistles, yet place them after ours.

Schroder (R., 202); Hendema (R., 229); Baird (R., 231); Wood (R., 238); Captain Mardon (R., 264), and Henley (R., 360), 361, all state that their first signal of one whistle was given just after passing buoy 9, when the *Victory* was certainly not above Craney Island.

The disinterested witnesses, Etheridge (R., 353); Goodwin (R., 373); Clark (R., 388, 390); J. M. Clark (R., 400); Wynne (R., 404), and Pebworth (R., 424); all substantiate our testimony on this point, stating that the *Plymothian* sounded the first signal upon passing buoy 9; that it was loud and clear; that they heard it before any signals from the *Victory*. All the foregoing witnesses place the *Plymothian* at buoy 9 when giving her first signal, and then it is conceded that the *Victory* was not nearer than Craney Island. Her own crew place her much above Craney Island; some, indeed, half way between there and buoy 7, when she sounded her first whistles. How, then, could her whistles have been given first?

It is a fact proved beyond question that they were not, but that the *Plymothian* gave the first signal, and so the District Court held in this language:

"After rounding buoy 9, and straightening out on her course down the channel, the *Plymothian* gave a long whistle, indicating that she would pass the *Victory* port to port. *It was some time before the Victory answered*, which she at length did with a cross-signal of two whistles. Nelson, her pilot, says, supported by a heavy preponderance of testimony, that she did not respond until she was half way between Craney Island Light and buoy 7."

And so held the Circuit Court of Appeals (R., 503).

V.

The *Victory* was under excessive speed, and did not promptly stop and reverse.

It is apparent, from the testimony of her master and pilot, alone, that the *Victory* did not stop and reverse when the law required her so to do, independent of the physical proof in the case, that at collision her headway was sufficient to penetrate fifteen inches of solid iron or steel.

Her fault is chiefly attributable to the dual command of master and pilot, and the absence of an efficient lookout.

Elcoate (R., 129) states that he was master-in-charge of the *Victory*, on the bridge (R., 124) stationed on the bridge in command, on the lookout, reporting to the pilot, who was specially directing the navigation, *under him*, yet *to whom* he reported the vessels that came in sight and the signals they gave (R., 134, 135, 147). Who was in command?

Nelson (R., 329) states he *supposes* Elcoate was in command of the ship, though he was directing its navigation, and denies that Elcoate reported to him as lookout.

At R., 342, in speaking of the whistles, he says he got Elcoate to look out for them—("I was busy"). And yet Elcoate makes no report of them to him; makes no mention of steam from the *Plymothian's* whistle, and states he didn't know she was blowing at all. He denies the elaborate conversation set out by Elcoate in his testimony, and in his pleadings (Answer to Ralli Bros.' Libel, R., 438, 439), and states (R., 342, 344) that no such conversation occurred.

At the most critical moment, Elcoate and Nelson are absolutely at variance as to the whistles below the pier, Elcoate (R., 141, 142), stating that nothing but one locomotive was blowing, corroborated by Gilbert (R., 68), and that he saw steam from the *Plymothian*, while Nelson (R., 332, 340, 342) states there were several blowing; he could not make them out, and got Elcoate to attend to this.

Their whole case here turns on their attack on the *Plymothian* whistles, an attack which has utterly failed, the preponderance of testimony, as shown herein later, being overwhelming, and entirely convincing to the mind of the District Judge, and seemingly also to the Circuit Appellate Court.

Such the master, lookout and pilot of the *Victory*. The result is not to be wondered at.

Though a great many witnesses prove without doubt that the *Plymothian* sounded at least two single blasts of her whistle, and the danger signal, loud, clear and distinct, neither the master nor the pilot hear anything from her, and see only two puffs of steam (one of them conveying a little sound to Elcoate).

Elcoate admits (R., 144) that he took these puffs to be two separate signals of one blast each, and that the *Plymothian* was going to eastward, yet Nelson (R., 342) says he did not so report them, though stationed there for that purpose. He took them for one signal of two blasts. The pleadings state that it was uncertain what they were. Under all rules, whether pilot, or international, or what, it was the *Victory's* duty at once to stop and reverse. Elcoate (R., 134) states that the *Plymothian* was porting her helm even before blowing his first signals; yet he blows her two whistles, sees steam from her, sees steam again fifteen seconds later, then blows his second two whistles, and only after that a minute or two (Candlish, R., 51, 56), blows his danger signals and reverses. Elcoate (R., 135, 136) admits that half a minute elapsed after the second signal before reversing.

Can the Court permit a master, seeing, according to his own statement, an approaching vessel altering her course so as to involve risk of collision, to signal her merely—not altering his speed, to wait passively to hear her repeat cross signals twice, to again signal as at first, and then wait half a minute before reversing until so late that at collision his vessel's speed is so great as to penetrate fifteen inches of metal, especially in view of the contradictory statements of these navigators, their misstatements of their own course and the course of the other vessel, and their false attacks on her whistles.

Her fault in continuing her unlawful course, when she should have reversed, is conclusive out of the mouths of her own master and pilot.

The Victory's Speed.

Her own deck testimony places the *Victory's* speed at, and after passing, Craney Island lighthouse, at from four to five and a half knots, save Nelson, who says her engines were barely turning over (R. 333, 338, 339). This is attempted to be substantiated by testimony from the engine-room to the effect that at 4.05 the engines were slowed down to half speed. This curious fact, which always appears in these collision cases, that a vessel runs at full speed until about five or ten minutes before a collision happens, of course, comes up here; but singularly enough, is not shown by the official records upon which it should show—neither the deck log nor the engineer's log record this slowing down at Craney Island, though written up after the collision, when it was known that every important movement of the *Victory* would come under a court investigation. Their disinterested testimony is strangely silent, while the testimony of the *Plymothian* gives her considerable speed.

The testimony of six witnesses from the *Victory's* deck is positive and unequivocal that the *Victory* had *sternway* on her at collision, save one, Stewart (R., 121, 122, 128), who states that, though she was moving backwards through the water, she was making headway over the ground. Candlish (R., 39), Gilbert (R., 65), Middleton (R., 97), Scott (R., 110), Elcoate (R., 141, 150), all so state, and further emphasize this statement by swearing that the *Plymothian* came into the *Victory*, moving backwards, at great speed, four or five knots, falling with her side upon the *Victory's* bow, some stating that her speed was undiminished and her engines not reversed until a foot off.

Candlish (R., 41, 42), Middleton (R., 96, 98), Scott (R., 109, 110), Stewart (R., 119), Elcoate, (R., 140).

Their disinterested testimony is not so strong.

South (R., 27, 28) thinks that she had sternway by her back-wash (which, by the way, is the manner in which

her crew judge of her backward movement). Rankin (R., 31) says he should think she had sternway, as she did not seem to have much headway at first; Swain, Page and Martin can't judge; Pratt (R., 311) states merely she had slowed down, but Wigham (R., 22) says engines were backing but ship was not; thinks she was moving forward; and Tweddle (R., 382) thinks engines were stopped, but the headway of vessel most decidedly was not stopped; while Nelson (R., 333) states the same thing, that otherwise the collision could not have happened. Speaks of *his* striking the *Plymothian* (R., 336), and states (R., 338, 342) that there was no tide that day, and if there was, that it would not alter the situation, as both ships were in the water.

The *Victory's* log (R., 165) gives a flat contradiction to her own crew in their reckless statements here, by the admission that the *Victory* at collision "was making little if any headway through the *water*." Counsel conceded, at the trial in the lower court, the tide to have been flood, running from two to two and a half knots at the time, and at the trial admits what the log has recorded. This admission in the log and by counsel make the deck witnesses of the *Victory* to be so reckless in their statements that the Court can scarcely rely on their statements in other respects.

The statements of the witnesses for the *Plymothian* conclusively show that the *Victory* was making decided headway at collision, and that the *Plymothian* was at least with speed fully checked. Lyons (R., 211), Baird (R., 232), Wood (R., 240), Schroder (203), Mardon (R., 266), Ham (R., 186), Henley (R., 362), all state positively that at the collision the *Victory* came into the *Plymothian's* side at a three to five knot speed, and that the headway of the *Plymothian* was fully checked; some, Ham R., 193), Wood (R., 239), Henley (R., 362), stating that she was possibly making sternway.

On this point the numerous disinterested witnesses strongly corroborate the statements of the *Plymothian's* crew.

Brown (R., 346) states the *Victory's* speed at Craney Island Lighthouse to be 12 knots, and notwithstanding

the severe attack of *Victory's* counsel, is corroborated by his own brag witness, Pratt (R., 309); Brown (R., 346) states her engines were reversed a short time before the collision. Pebworth (R., 424) puts her at full speed passing the *Virginia Dare* and then she slowed down. Wynne R., 405) states the *Victory* was moving rapidly with a flood tide, and her headway was not checked until the collision, being positive that she was making headway at the collision, estimating her speed before that 8 or 10 miles an hour (R., 406.) Etheridge (R., 354 to 357) estimates her speed at 10 to 12 miles an hour and at collision at 5 miles. Goodwin puts her speed at 10 miles an hour before collision (R., 375) and Clark (R., 402) don't suppose she had much headway at collision.

These witnesses state positively that the *Plymothian* had little or no headway at the collision. Etheridge (R., 355) gives her sternway. Goodwin (R., 374, 375) no headway, entirely checked, stopped altogether. Clark (R., 388) don't think the *Plymothian* was going ahead but very little, if any. Wynne (R., 405) gives her headway as checked, while all the disinterested witnesses of the *Victory* are strangely silent as to the *Plymothian's* speed at the collision.

The weight of testimony is vastly in our favor here, especially when it is seen that the physical facts all prove the *Victory* to have been the moving vessel, and not the *Plymothian*. An examination of the photographs shows that; nor has the fact of a piece of plate being found in the *Victory's* bow any weight to show the contrary, in the light of the testimony of Captain Sanford and Mr. Quigley. The motion of the *Victory* could have caused that as well as that of the *Plymothian*, and did cause it—striking at that angle. A two to two and a half knot motion on her part is admited, a greater is proved; while the proof shows our headway fully checked.

The foregoing testimony demonstrates that the *Victory* had considerable headway on her at the moment of collision while the headway of the *Plymothian* was entirely checked, if she was not moving backwards. Thus

the District Court has held in the following language (R., 451):

"The headway of the *Plymothian* was overcome, and it is possible she obtained a slight backward movement. The headway of the *Victory* was not overcome, and she ran into the *Plymothian's* broadside, with such force as to drive 15 inches into her side and to render immediate beaching necessary. She penetrated 15 inches into the *Plymothian*, notwithstanding the fact that the angle of incidence with that ship was 60 or 70 degrees."

That the *Victory* was the striking vessel, and that the allegations in the pleadings, repeated in the testimony of several of the *Victory's* crew, to the effect that she was making sternway in the water, when the *Plymothian*, moving rapidly, fell sideways against the tide upon her bow, was not true, is thoroughly established by the great weight of testimony; this is shown by the preceding citation from the opinion of the District Judge, and is demonstrated by the express admission of Pilot Nelson (R., 333), who says: "Of course, she (*Victory*) would have to be moving ahead to strike the ship, * * * she had to do that to strike the ship."

We cannot well conclude our discussion of the navigation of the *Victory* and the testimony of her crew without directing the Court's attention to the answer filed by Captain Elcoate to the cargo owners' libel, and to the numerous and important contradictions in the testimony of the Master and the Pilot of the *Victory*.

Answer to Ralli Brothers' Libel, R., 436, 439.

The remarkable document filed under oath, by Captain Elcoate, after the testimony of the *Princess* and his own crew and his own testimony had been given and he had left the witness stand, is called to the attention of the Court for its manifestly reckless statements, especially as regards the whistle of the *Plymothian*, and her being on the west side of the river and the *Victory* being on the east side of the river. He places the *Plymothian* in this

answer (R., 437), when first sighted, 340 feet from the red buoy, yet on page 148 of his cross-examination, he distinctly says he could not tell how near to that buoy she was. It contradicts not only many of the statements of his own witnesses and his pilot, given afterwards, but is self-contradictory. It places the *Plymothian* at one time only two points on the starboard bow and twice afterwards four points on the starboard bow. It sets out, in detail, conversations with his pilot, which his pilot absolutely denied; it brings in, for the first and only time in this long record, the mention of a tug as interfering with the navigation of the *Victory*, between buoy 7 and Craney Island, a vessel which is not mentioned by any of his crew or his disinterested testimony, or the *Plymothian's* crew or her disinterested testimony, nor by him when on cross-examination; he states unqualifiedly and unreservedly, that the *Victory* was moving backward through the water and perhaps over the ground, contrary to the statement of Pilot Nelson under oath, and contrary to the concession of his own counsel at the trial.

In view of the testimony, which is now before the Court, this is indeed a most remarkable document, and shows either that Captain Elcoate made deliberately false statements, or was so absolutely reckless and inaccurate in his calculations as to make his testimony unreliable.

Contradictions of *Victory's* master and pilot.

The master and pilot of the *Victory*, the two navigators of the *Victory*, are in such hopeless conflict as to almost every important fact connected with this collision that their testimony can be considered of but little weight.

Taking the *Victory* from the time she started from Hampton Roads up to the time she sunk the *Plymothian* in violent collision, there is scarcely a single fact upon which they agree.

As to the command of the vessel, neither seems to know which was master, Elcoate (R., 129) stating he was master in charge of the bridge in command, on lookout, and *reporting to the pilot* (R , 134), while Nelson says (R., 329) he supposes the captain was in command.

As to her speed to Craney Island, Elcoate (R., 131) says the *Victory* left Hampton Roads at 3.30 and came up to Craney Island at full speed, about 9 or 10 knots, while Nelson says (R., 329) that she left about 3 P. M. and came up at about 5 knots (R., 334).

As to passing the English steamer, Elcoate (R., 131) says she gave the *Victory* two whistles and passed starboard to starboard, while Nelson (R., 330) don't remember signals (R., 335); no signals were exchanged but they passed starboard to starboard, though the *Victory*, prior thereto, had been keeping on the west side (Elcoate saying, R., 145, they were in mid-channel), thus voluntarily adopting for her a wrong course even this far down.

As to passing river steamers, Elcoate (R., 151) states that the *Victory* was in mid-channel when she met the steamers; that they gave her two whistles and forced the *Victory* to go to the east, while Nelson (R., 330) says it was a voluntary act; that he saw the steamers and took the eastern side because he knew they were going to take the Swash Channel and he wanted to give them room.

As to passing the schooners, Elcoate (R., 132 3) places them all east of mid-channel in going down the river, while Nelson (R., 337) mentions only one schooner on the eastern side, placing the other schooners on the western side, and that single schooner was going up the river drifting with the tide.

As to taking to the eastern side, Elcoate states they were forced there, as does the log (a fact entirely disproved), while Nelson (R., 334-6) goes there, not because he was forced, but to avoid the *Plymothian*, with reference to which he was directing his navigation.

As to first sight of the *Plymothian*, Elcoate, though on the lookout, as he says, don't see her until she is 200 yards west of buoy 9 (R., 157), while Nelson (R., 338) sees her coming out of slip at Lambert's Point.

As to whistles around Lambert's Point, Elcoate (R., 141) states that there were no whistles or sounds from vessels or anything from pier, save one locomotive, while Nelson (R., 340) states there were several whistles blowing at the time (R., 342); he couldn't distinguish them, so he asked Elcoate to keep a lookout for whistles; he was busy.

As to *Plymothian's* own whistles, they also differ, El-

coate seeing two puffs of steam 15 seconds apart, which at one time he takes to be two separate whistles of one blast (R., 154), though later he understands them as one signal of two blasts, while Nelson sees steam (R., 342-3), but hears no sound, and is entirely unable to tell whether it was one or two whistles, and he didn't know she was blowing at all.

Elcoate's testimony is full of alleged conversations between himself and the pilot, as to the whistles and the *Plymothian* porting (R., 134, 153), being repeated in detail in the answer to Ralli Bros. (Libel, p. 438-9), all of which conversations Nelson (R., 343) denies, saying (R., 344) that they never occurred, for he would have remembered them.

As to courses and speed of *Plymothian*, they are equally as much at variance. Elcoate places her well over on the western side of the channel repeatedly, giving the distance from the red buoy in feet and inches, while Nelson (R., 331) first speaks of her straightening down the middle of the channel, though is led to place her on the western side; on cross examination (R., 341) he again places her in mid-channel or a little to west side, where she hangs for one or two minutes (R., 342). Elcoate estimates *Plymothian's* speed at three to four knots (R., 140), and being little diminished at collision, while Nelson (R., 339), the navigator, didn't notice the speed of this vessel at all and cannot form any idea, to save his life, as to how fast she was moving at the time—a fine navigator, indeed! Although it is conceded that there was a flood tide at the time, which Elcoate says (R., 137) had much effect in canting the *Victory's* head to port (R., 150), about two points, Nelson (R., 335, 338) says the tide was about slack, that there was very little tide any way in the channel, and (R., 342), it would not have any effect any way, as both ships were in the water. As to steering rules, Elcoate (R., 152), is acquainted with starboard hand rule in narrow channels, but Nelson (R., 339), above Craney Island, runs by judgment altogether, and always makes it a rule when he sees a ship coming, to give him all the room he can, to keep out of the way, yet (R., 337), don't steer a regular course, but makes the best cut he can, having to use judgment about things of that sort.

Nor do they even agree as to the *Victory's* headway at collision, Elcoate (R., 141), stating that the *Victory* was going astern, while Nelson (R., 333), entirely negatives this statement by saying that she had headway on, and had to have it in order to strike the *Plymothian*.

And Elcoate caps the climax by swearing, against the testimony of every other witness in the case, and all the physical facts, that the *Plymothian* fell on him with such force that she passed entirely across his vessel, her stern clearing his bow.

Can counsel point to one single fact as to which these two navigators are in accord? He will attempt an explanation of the gross discrepancies, by pleading old age and lapse of memory for Nelson, but the vigorous man on the witness stand would himself scorn such a plea and indeed has already said (R., 344), that he recollects all the facts connected with this case.

His testimony alone has lost his case, as his obstinacy and ignorance in steering not by rule but by judgment caused the collision.

The foregoing discussion of the evidence shows the vast weight to be:

(*a.*) That the *Victory* did not pass Craney Island close on the east side of the channel, but certainly in mid-channel, if not on the west side ;

(*b.*) That had she so passed the lighthouse and moved on the east side, such position in spite of her insistence to that effect, was not forced on her, but, as her pilot swears, was entirely voluntary, was a serious fault, and directly contributed to the collision ;

(*c.*) That this was merely an attempt to antedate her moving to the east side, which was done when she was more than half way between the lighthouse and buoy 7, and in face of her legal obligation to be and remain on the west side ;

(*d.*) That she did not sound the first signal ;

(*e.*) That she did not respond promptly to the *Plymothian's* signal, and when she did, gave a cross-signal;

(*f.*) That she had confusion in the command of her vessel and an inefficient lookout;

(*g.*) That she did not promptly stop and reverse;

(*h.*) That her speed was too rapid, and that she was the striking vessel, bringing about the collision by her movement under starboard helm, as admitted in her log.

Every allegation of fact made by the *Plymothian* against the navigation of the *Victory* has thus been proved by a great weight of testimony; each individual fact thus alleged has been passed upon by a judge of twenty years' experience, before whom the two pilots, the navigators of their respective vessels, and all but four of the disinterested witnesses, have been examined, and each fact found in our favor.

This finding of the District Court has been fully concurred in by the Circuit Court of Appeals, which, in its opinion (R., 503), uses this language:

"The Judge who has heard the case, and with his usual care and ability, examined and weighed the testimony, came to the conclusion that the *Victory* was grossly in fault, so much so as to be the sole cause of the disaster. Whilst not going to this length with him, this Court fully concurs in his conclusion that the *Victory* was grossly in fault. * * * The course of the *Victory* seems almost willful."

In the face of these findings by the lower Court, the foregoing facts must be regarded as established. Being so established, the fault of the *Victory* is as gross as if the International Rules were to apply. The vessels were end on, if not on each other's port bow, and it was the duty of the *Victory*, after passing Craney Island, to have answered the one whistle of the *Plymothian* with one whistle, to have put her helm to port, and remained in mid-channel or have gone to the westward.

It was her flagrant violation of this duty and her obstinate perseverance in such violation, failing, at the same

time, to take the other precautions for avoiding collisions enjoined on her by law, that caused the collision and the heavy damages ensuing therefrom.

The Navigation of the *Plymothian*

VI.

The *Plymothian* did not cross over to the western side of the channel, but moved down the eastern side of the channel under a port helm, her proper course.

The entire case of the *Victory* turns on their two main charges. First, that the *Plymothian* was on the west side of the river and recrossed to the east, and, second, that her whistles were defective.

As to the first, the burden of their song is our being on the west side, making the second situation under the Inspector's rules.

Let us examine their testimony on this point.

Candlish sees her when the *Victory's* second signals are sounded, and then in the west side of the channel three and a half points on his starboard bow, moving under port helm (R., 70). Gilbert (R., 63), sees her off Lambert's Point on west side, heading down the channel three-quarters of a mile off. Middleton (R. 95), sees her half a mile or more off on the west side and four points on his starboard bow. Scott (R. 107-8), sees her on the opposite side of the river after his first signal. Stewart (R. 232), don't see her until she is 450 yards off, four points on the starboard bow. Elcoate (R. 134), sees her three-quarters of a mile off, heading to the north on the west side of the channel near the red buoy.

Such are the sworn statements of their crew and of their numerous pleadings.

Of their other witnesses, Wigham (R. 21), puts her on the starboard side of the *Victory*, 720 feet from the *Princess*, lying near mid-channel off Lambert's Point. South (R. 26), says she passed his ship, which was on the west

side of river, but don't place her there, and Rankin (R. 31), only places her on west side of channel—but he places her 300 yards from the *Princess.**

Of their other witnesses on this point,

Swain (R. 303) places her west of mid channel, 100 feet only (but his mistake of 300 feet as to the Merrimac buoy would place her east of mid-channel, if corrected).

Pratt (R. 306) places her within 200 feet of Merrimac buoy, where she would have run over the *Storm King* and *Commodore*. Page (R. 314) places her on the west side, but he knows nothing about buoys or channels, and his testimony on this point cannot be considered. Martin (R. 323) places her in mid-channel only, possibly a little to the westward, and Tweddle don't see her until the moment of collision.

Taking the above testimony alone, an analysis will show that only one or two witnesses positively place the *Plymothian* on the west side.

The crew of the *Victory* all place the *Plymothian with reference to their own vessel*, and that at a time when we charge they were *crossing from west to east*. A bearing from the *Victory*, when heading up channel, that would place the *Plymothian* on the west side, would, if the *Victory* was moving across the channel, place the *Plymothian* in mid-channel; and that she was heading across channel after sounding her second signals is shown by the testimony of her crew, Nelson and the captain and Martin and Page, when they say the *Victory* was heading directly for the end of the coal pier. If she was, at or after passing Craney Island, in mid-channel, or was west

* In this connection, the attention of the Court is directed to the admissibility of this evidence. It will be seen (R., 20, 21), that reasonable notice was not given; that the written notice required by the statute was not served, nor the depositions properly filed. Counsel, it is true, appeared; but exceptions were then and there noted, and subject to those exceptions the witnesses were cross examined.

These witnesses are the only ones on either side whose integrity has been attacked; hence, technical objections have been insisted upon in both lower courts.

While no specific ruling has been made on the admissibility of this evidence, no weight has been attached to it by either court. Everything testified to by these three witnesses has been disbelieved.

The testimony should not be considered.

of it, such heading would throw her across channel, and then this starboard bearing of the *Plymothian* to the *Victory* would be easily explained, and a gross conflict of evidence (on any other theory) would be reconciled. Such was the *Victory's* course, and such the explanation of her crew's testimony unless their counsel chooses to make them deliberate falsifiers

So with the *Princess* testimony. They place the *Plymothian* relatively from their vessel, and an inspection of the chart will show their estimates to place the *Plymothian* east of the mid-channel.

Pratt and Elcoate only are left, worthy associates, one sinking necessarily two vessels in his estimate, and the other contradicting his own pilot, for Nelson (R., 342), in spite of the pleadings, his crew and captain, places the *Plymothian* only in mid-channel, another variance with Elcoate as to a most material point.

Their testimony, therefore, places the *Plymothian* no farther to the westward than mid-channel; not a case of the second situation even here.

The witnesses for the *Plymothian* entirely controvert even this contention by the most conclusive testimony.

Take the *Plymothian* (*a*) in passing buoy 9, (*b*) proceeding down to point of collision, which is conceded to be on the eastern edge of the ship-channel.

(*a*) *In passing buoy No. 9.*

Of our deck testimony: Schroder (R., 202), Lyons (R., 209), Hendema (R., 220), Baird (R., 231), Wood (R., 238), Mardon (R., 263), and Henley (R., 360), all testify that the *Plymothian* passed the black buoy No. 9 close aboard, their estimates varying from a few feet to a few yards. The disinterested testimony of Etheridge (R., 353), Goodwin (R., 373), John Clark (R., 388), Harrison (R., 395), Joe Clark (R., 401), Channel (R., 431), who were all within a few yards of the *Plymothian* as she passed this buoy, absolutely clinch the proof on this point, independent of the much abused and alleged far sighted Wynne, who makes the same statement (R., 404), which is further borne out by the *Victory's* boss witness of color, Swaim (R., 296).

Nor is this contradicted in any way by any of the opposing testimony, not even of the *Princess*. It may be taken as a demonstrated fact, in the light of all this testimony, that however the *Plymothian* may have moved after passing buoy 9, when she passed that buoy she was within a few feet or a few yards of it, and on the eastern edge of the channel.

What, then, becomes of the earnest contention of *Victory's* counsel that it was impossible for her to have turned short round buoy 9, that the tide must have taken control of her and swept her over to the west side of the channel?

It is in evidence that so quickly did the *Plymothian* obey her port helm that her engine had to be stopped to keep her stern from striking the pier. It is well known that a tide will have more effect on a loaded vessel's stern than her bow, especially, as in this case, when her rudder is against the tide and offering a salient point of resistance. This flood tide aided rather than impeded, therefore, this movement of straightening down the channel and turning buoy 9, and it was entirely possible for the ship in moving the 350 yards from the pier to buoy 9, to have swung around the buoy and been practically straight in the channel immediately upon passing it, as we contend (John Clark, R., 392).

Thus it is demonstrated, beyond dispute, by numerous witnesses within a few feet of this vessel passing this buoy, and on all sides of her, and whose integrity is beyond question, that she did pass this buoy within a few feet, as we maintain.

Right here we are again met by the contention that in coming out from the pier into the river, we had the *Victory* on our starboard bow, and hence the *Victory* had the right of way and we should have avoided her. His pilot, Nelson, does not so contend and did not navigate his vessel under any such theory; for if he had the right of way, then under the rule he *should have held his course* and let us avoid him; yet his testimony is replete with statements of his numerous attempts to avoid us. On pages 331-2, he says: "Q. You saw her in the western side of the chan-" nel? A. Yes, sir. Q. And your vessel was on the east-

"ern side? A. Yes, sir; I went on that side to give him "room; I saw him coming out" (R., 334), "I kept on that "side to keep out of her way."

And on page 336:

"I saw the ship coming out and coming down and that was the only way to run; I wouldn't attempt to go to the west and just bother him."

And on page 51:

"I didn't want to run into her, because I saw the ship coming down on the western side, and of course *I went to* the eastern side to give her room to go down to the west. I wanted to give her all the room I could" (R., 337). "I was giving the *Plymothian* channel to go down to the westward of me. * * * There was plenty of water for me, and I *ran over* to give the *Plymothian* room to come down the west of the middle of the channel" (R., 339), "to give her room to go down *mid-channel*; that's why it was done, for I always make it a rule, if I see a ship coming, to give him all the room I can; to keep out of the way."

Do not these citations show clearly that our contention of her coming from the west to the east after seeing us is true, as the log inferentially show also, a contention which also reconciles, in a remarkable degree, the testimony of the *Victory's* crew placing the *Plymothian* on the western side relatively to their boat (two to four points on her starboard bow), when, by putting her under starboard helm across the channel, heading for the pier, the *Plymothian* would be, by their statement, on the eastern side of the channel, as these numerous disinterested witnesses conclusively prove?

We have already shown that the starboard hand rule (No. 19) cannot apply to a vessel at a pier nor moving out into the channel unless the other vessel is within signaling distance. This signal distance is little more than half a mile, as is seen by referring to Pilot Rule No. 3 (R., 431), and certainly cannot be more than a mile, which was less than the distance between the *Plymothian*, straightened down the channel at buoy 9, and the *Victory* below Craney Island.

The language of Rule No. 19 of itself makes this apparent, for, in its first clause, it applies only to "two ships under steam crossing so as to involve risk of collision."

Counsel is therefore precluded from making this contention, not only by the foregoing testimony of Nelson, but by the action of the navigators of the *Victory*, for they did not consider the *Plymothian* within signaling distance until the *Victory* was more than half way down from Craney Island and within 500 yards of buoy 7, a point of time at which the proof conclusively establishes the *Plymothian* as being well over to the eastern side of the channel.

(b.) How did the Plymothian proceed from buoy 9 to point of collision?

We have already seen that a close examination of the testimony for the *Victory* does not place the *Plymothian* more than in mid-channel, which is the estimate of their leading witnesses, Martin and Nelson. The former is followed in this estimate by John Clark, who was standing on the pier alongside of him, but an examination of the chart will show that it would be very difficult, at the angle at which, from the pier, they are looking down the channel, to judge exactly. So might Brown's testimony be also explained, for, notwithstanding the heavy attack made on him by libelant's counsel, he was as honest an old fellow as ever testified in a court of justice.

The great weight of testimony, however, is to the effect that the *Plymothian* passed down the river as close to the eastern edge of the ship channel as loaded ships venture, and in the conflict of testimony on this important fact in the case, the Court must be guided by the preponderance of testimony, and especially by these disinterested witnesses, whose integrity is unquestioned, and who were in the best position to judge of the situation. The deck testimony of the *Plymothian* is unanimous to this effect—Ham (R., 184), Schroder (R., 203), Lyons (R., 209), Baird (R., 231), Wood (R., 238), Mardon (R., 268, 280), and Henley (R., 365), and, despite the statements by counsel that their testimony amounts to but little, for the reason that they knew nothing about the channel, and did not

even notice the buoys, can be relied on equally as much, and, in our opinion, very much more than that of the *Victory's* crew. They do notice the buoys, and testify with reference to them, with the exception only of Ham, who did not notice buoy 9.

Our disinterested testimony is conclusive, even to the most doubting, as it has proved to counsel for cargo, who, despite his manifest interest to hold the *Plymothian* in fault, as well, makes no charge against her navigators here.

Etheridge (R., 353, 354), and Goodwin (R., 373), on the tug *Commodore*, on the west side of the channel, in a position where the *Plymothian*, if on the west, would have sunk them, along with the barge *Storm King*, testify she went down on the east side, one saying as close as a loaded ship ought to go. Joe Clark (R., 402) and W. T. Harrison (R., 395), on the *Pioneer*, just inside of buoy 9, so state unequivocably. Wynne (R., 404) testified she appeared to him pretty close to the eastern side of the channel. So states Pebworth, on the *Virginia Dare* (R., 424), and Channel, on the *Olive* (R., 429), who passed down the river (presumably not more to the westward than mid-channel, as the *Princess* and *Storm King* were anchored there), leaving the *Plymothian* to the starboard (R., 429), stating that she was hugging the black buoys pretty close.

Can there be any question now on this point when these seven disinterested witnesses, with one exception practically alongside the *Plymothian* and in the best position to accurately note her movements, corroborate the positive statements of the seven witnesses from the deck of the *Plymothian* to this effect, especially in view of the weakness (on analysis) of the testimony on this point for the *Victory*.

On this question of fact the District Court has spoken in no uncertain language. It says:

"But it may as well be premised that the *Plymothian* had not before then, in coming out from Lambert's Point, gone over to the western side of the channel near to red buoy 22, and had not after doing so recrossed the channel to reach its position near buoy 9, as claimed by the *Vic-*

tory's counsel. The tide was not strong enough to force her over there, and it would have been out of her course to have gone there. * * * The testimony is conclusive to that effect."

Again (R., 449):

"The *Plymothian*, on straightening out at buoy 9, had begun to move against the tide at the rate of four miles an hour. The *Plymothian* moved on a ported helm and kept well to the eastern side of the channel."

No less uncertainly has the Circuit Court of Appeals held; for it has found that the *Plymothian* straightened out at buoy No. 9, and proceeded down her starboard side of the channel, her proper course.

This Court, therefore, must take it as a proved fact that the *Plymothian* did not go to the west side of the channel, but, on the contrary, passed close aboard buoy 9 and down the river well over on the east side, as was her duty. If such be its conclusions, the entire fabric of the *Victory's* defense must fall. Her pilot navigates her solely with reference to the *Plymothian* being on the west side (R., 339); so does her master. All the pleadings are drawn based on that main fact; Elcoate being sufficiently reckless, in his answer to Ralli Brothers, sworn to after he left the stand, to place her by feet and inches on the west side with reference to the Merrimac buoy, as he had not dared to do when subjected to cross examination. Such is the theory of all of their testimony; thus their counsel's defense.

Taking the *Victory* even no further to the westward at Craney Island than mid-channel, and the *Plymothian* at and after passing buoy 9 on the east side, the vessels were port to port and the signal of the *Plymothian* of one blast, and her course based thereon, was as the law directed. The argument on this point in brief of *Victory's* counsel is most interesting as to the duties of vessels meeting end on or nearly so, or port to port, and lays done very clearly the duties of the *Victory's* navigator under such circumstances; and it is most unfortunate that he did not in this case steer by rule and not by judgment in order to make the best cut to Lambert's Point. The cut down of the *Plymothian* here was scarcely the best cut open to Pilot Nelson.

VII.

The *Plymothian's* whistle was not defective.

The most vicious attack made by the *Victory* against the *Plymothian* has been on the subject of her whistles. Their pleadings all the way through ring the changes on this subject, and especially the remarkable document sworn to by Elcoate after he had left the stand and filed as his answer to Ralli Brothers' libel (R., 436). The first of their disinterested testimony is replete with the same attacks, and it is not until the trial of the case in the lower court was reached and the overwhelming weight of disinterested testimony on this point was examined, on behalf of the *Plymothian*, that any check was had on this, their main contention.

These attacks, upon investigation, utterly fail. None of the *Victory's* crew of six men on deck, nor Pilot Nelson, hear a sound from the *Plymothian* (Elcoate only hears one faint sound) and only a few of them see two puffs of steam from her whistle. They hear no sounds of any kind; no salutes, no pass signals, no danger signals, testifying, too, on their solemn oaths. Wigham, South and Rankin (R., 22 27-30) hear only one faint sound, which they state the *Plymothian* made when she was close on top of the *Victory*. Swain (R., 293-297) says she gave him two whistles, very indistinct, full of water, but places her manifestly in a position she never occupied, and contradicting thereby every witness in the case. She could not have given him these signals, nor could he have been in that position. He hears no others save just two before collision, and he *can't tell from which vessel* (R. 297). He could not have been very much impressed with the defects of ours therefore.

Pratt (R., 306), hears the *Plymothian* blow one whistle, and in no way criticises it, and Page, Martin and Tweddle, all of whom are on the pier, and in the best position to notice any defect in it, all decline to testify on this subject. Surely had there been any such defects as are described by the *Princess* people, they would have noticed them and the libelant's counsel would have been very quick to give

their testimony on this point; yet their recollection is blank as to our whistles.

So much for the testimony against us.

To rebut this we produce, first, twelve witnesses who were on board the *Plymothian* at the time, all of whom state they heard her whistles, not once, but many times, and that they were all loud, clear and distinct, with nothing the matter with them: Scullard, (R., 173), Cronquist (R., 175), Pearse (R., 180), Ham (R., 185,) Schroder (R., 202, 204), Lyons (R., 209), Hendema (R., 220), Baird (R., 231), Wood (R., 238, 239), Ecrath (R., 256), Marden (R., 264), Henley (R., 363).

So also testify eight disinterested witnesses who were surrounding her at the time, most of them a short distance off, all of whom testify that they heard her whistles in leaving the dock, on saluting the tug, on signalling to the *Victory*, and upon reversing her engines, that they were all loud, clear and distinct, save only Harrison, who says that the first of the tug salute had some steam in it.

We do not deem it necessary to quote this disinterested testimony at length, but will merely cite the witnesses. See Etheridge (R., 353), Goodwin (R., 373, 374, 376), John I. Clark (R., 388 to 391), W. T. Harrison (R., 394, 395), Jos. M. Clark (R., 400, 402, 403), Wynne (R., 404 to 406), Pebworth (R., 424), Channel (R., 429).

The District Judge in his opinion, (R. 451), has found that the whistles of the *Plymothian* were as good as those of English steamers usually are, and were in good working order, and the Court of Appeals has found no fault with them.

In view of this overwhelming weight of testimony and these findings, the Court can entertain no charges against the whistle of the *Plymothian* as not being a lawful signal.

VIII.

The *Plymothian* signaled first and properly.

This has already been fully argued when we endeavored to show that the *Victory* did not signal first. To this we now refer, with the full confidence that our contention here has been fully demonstrated.

IX.

The *Plymothian* was moving under moderate speed, and, on the first indication of *Victory's* change of course, promptly stopped and reversed, with headway at collision entirely overcome.

We now approach the point at which the Circuit Court of Appeals has not followed the findings of the District Judge. Both Courts have held the *Victory* grossly at fault; the District Judge exonerated the *Plymothian* from all contributory fault of navigation, while the former has found her guilty of some undefined acts of omission.

THE CIRCUIT COURT OF APPEALS ERRED IN REVERSING THE FINDINGS OF FACT OF THE DISTRICT COURT, AS THE GREAT MAJORITY OF THE WITNESSES WERE EXAMINED BEFORE THE DISTRICT JUDGE, AND HIS FINDINGS CANNOT BE SAID TO BE CLEARLY AGAINST THE WEIGHT OF TESTIMONY.

It is a familiar rule in appellate practice that where the witnesses have been examined before the District Judge, and the evidence discloses conflicts, upon which the credibility of the witnesses has a bearing, Appellate Courts do not reverse the findings of fact, unless they appear to be clearly against the weight of evidence.

The *Grafton*, 1 Blatch., 173.
The *Sampson*, 4 Blatch., 28.
The *Florida*, 4 Blatch., 470.

The *Sunswick*, 5 Blatch., 280.
The *Guimarais Appeal*, 38 Fed. Rep., 528.
The *Thos. Melville*, 37 Fed. Rep., 271.
The *Albany*, 48 Fed. Rep., 565.
The *Alijandro*, 56 Fed. Rep., 621.
The *City of New York*, 54 Fed. Rep., 181.
The *Wilhelm*, 59 Fed. Rep., 169.

In the cases at bar the evidence was conflicting. Two pilots and seventeen of the twenty-one disinterested eye-witnesses were examined in open court; the District Judge is one of more than twenty years' experience in that district, is thoroughly acquainted with the waters in which the collision occurred, and the needs of navigation therein: is presumed to know, and did know, personally many of the disinterested eye-witnesses, who, being tugboat men, making their living in these waters, were able to give, and did give, the most intelligent account of the collision, from an unbiased standpoint and free from the excitement of impending danger. He was, therefore, peculiarly fitted to judge of their credibility, to properly weigh this conflicting testimony and to arrive at a just and proper conclusion. His conclusion, freeing the *Plymothian* from fault upon the facts, will be found after examination of the record to be not only not *clearly* against the preponderance of testimony, but fully sustained by the great weight of it.

Both courts having held the *Victory* at fault, her gross negligence in the collision can no longer be an open question.

We can, therefore, invoke another principle of law equally well established.

THE FAULTS OF THE *Victory* BEING CLEAR, IT IS NOT ENOUGH TO RAISE A DOUBT AS TO THE CORRECTNESS OF THE *Plymothian's* NAVIGATION. TO MAKE A CASE OF APPORTIONMENT, HER FAULT MUST BE CLEARLY ESTABLISHED BY AMPLE EVIDENCE, AND ANY REASONABLE DOUBT AS TO THE PROPRIETY OF HER NAVIGATION SHOULD BE RESOLVED IN HER FAVOR.

This principle is well established both in the lower courts and in the Supreme Court. The rule is well stated by Mr. Justice Brown, in the case of the *City of New York*, 147 U. S., pp. 71, 85, where, in delivering the opinion of an unanimous Court, he says:

"In view of the recklessness with which the steamer was navigating that evening, it is no more than just that the evidence of contributory negligence on the part of the sailing vessel should be clear and convincing. Where fault on the part of one vessel is established by uncontradicted testimony, and such fault is, of itself, sufficient to account for disaster, it is not enough for such vessel to raise a doubt with regard to the management of the other vessel. There is some presumption at least adverse to its claim, and any reasonable doubt with regard to the propriety of the conduct of such other vessel should be resolved in its favor."

The *Ludvig Holberg*, 157 U. S., 60, 67.
The *Delaware*, 161 U. S., 459, 470.
The *Oregon*, 158 U. S., 186, 197.
The *Great Republic*, 23 Wall., 20.
The *Athabasca*, 45 Fed., 651, 655.
The *Manistee*, 7 Biss., 57.
The *H. Clay*, 72 Fed., 1021, 1022.
The *Mexico*, 78 F. R., 653, and cases.

The underwriters on cargo stand in no different position in this regard than the owners of the *Victory*. The apparent hardship of the cargo underwriters arises solely from the Act of Congress limiting their recovery against the principal wrongdoer; but for this statute limiting the ship owners' liability, they could have recovered their whole loss from the owners of the *Victory*. It is a mistake, therefore, to regard the position of "innocent cargo" as one of hardship, because the wrongdoing vessel is of a value less than the injury inflicted by her. Rates of insurance presumably are adjusted with regard to these limitation statutes. And where, owing to these statutes, full recovery cannot be had against the wrongdoer, their remedy against the other vessel must depend upon their ability to clearly prove contributory negligence on her part. The *Ludvig Holberg*, above cited, was a case in

which owners of cargo proceeded against one of the vessels charged with fault in collision, and this Court there reaffirmed, as to them, the principle above quoted from the opinion in the case of *The City of New York*, and in almost the same words.

This principle of "innocent cargo" seems to have had a most potent effect before the Circuit Court of Appeals, as their whole decision seems to be based upon the idea of giving complete indemnity to these cargo owners; for, while fully agreeing with the District Court as to the gross faults of the *Victory*, it proceeded to hold the *Plymothian* also to have been sufficiently negligent as to be deprived of her *pro rata* recovery on the *Victory's* bond and to require her to make up the deficit of such bond to the cargo owners.

The *Plymothian* does not appear to have been held in fault in any specific matter, save only in failing to adopt certain indefinite precautions, relating presumably to slackening speed, stopping and reversing under Article 21 of the Rules of Navigation.

The opinion charges her with "doggedly keeping her course, without taking any precaution whatever, until too late, and when the pending collision became inevitable": * * * that "the slightest change in the course of each or either of the vessels would have prevented the collision": * * * that "the Court cannot find anything in the records which shows any precaution taken by the *Plymothian* when she saw the *Victory* disregarding her signals and obstinately pursuing the course. The only thing which she did was simply to repeat the disregarded signal. Even that was not done until it became too late to avoid a collision": * * * that "the *Plymothian* was guilty of an act of omission. The course of the *Victory* seems almost willful. The *Victory* was the chief cause of the disaster. If the *Plymothian* had taken the precaution which she should have taken, the disaster *might have been prevented*."

The Court does not hold, therefore, that, had these precautions been taken, the collision would have been prevented.

This of itself is sufficient for the Circuit Court of Appeals to be held in error, and the decision of the District

Court to be sustained. The authorities just quoted fully establish that the fault on the part of the *Plymothian* must be clearly proved and that every doubt must be resolved in her favor. It was therefore incumbent upon the Circuit Court of Appeals to point out definitely the faults of the *Plymothian*, and to have definitely held that such faults were not only clearly established by the weight of testimony, but that they also constituted a contributing cause to the collision.

An inspection of the record will not disclose, however, that any such fault existed in the navigation of the *Plymothian*, but, on the contrary, every precaution possible was taken by her the moment the *Victory* gave her a cross-signal, and by a change of course created the risk of collision.

According to the testimony of the *Plymothian*, when the first signals were exchanged the *Plymothian* was proceeding down the eastern side of the channel after passing buoy 9, and the *Victory* was coming up the river in mid-channel; the vessels were thus on each other's port bow, and were not moving in such direction as to involve risk of collision; it was only after the second repetition of the *Plymothian's* one whistle that the *Victory* gave the cross whistle and commenced her movement to the eastward under a starboard helm. The proof shows that the *Plymothian* was moving under moderate speed against the tide, not having had sufficient time after leaving dock to get the full effect of her engines; and that as soon as this cross whistle of the *Victory* was heard and her unexpected movement to the eastward was developed, the *Plymothian's* engines were reversed full speed, and by the time she was struck her headway had been entirely checked and she had possibly attained a slight backward movement as found by the District Judge (a finding not reversed by the Circuit Court of Appeals as far as its opinion discloses).

That is all that she could have done, all that the law required her to do.

The rule of navigation on this point is in the following language:

"Every steam vessel when approaching another vessel so as to involve risk of collision, shall slacken her speed, or, if necessary, stop and reverse."

According to the overwhelming weight of testimony the speed of the *Plymothian* was most moderate; there was no obligation therefore on her to slacken her speed.

The language of the rule does not require the vessel to stop and reverse unless it is necessary, and it is never necessary to do so on the mere approach of two vessels to each other. They must be approaching so as to involve risk of collision.

It is not against the law for steamers to run at moderate speed or even at full speed. That is the purpose of their construction; for courts to require steamers, on the mere approach of each other, to be stopping and reversing, or even slackening speed, is to relegate us to the days of canal boats.

The question of when it is necessary to stop and reverse is not always easy of solution. In deciding it, the Court must not be governed by the facts as they appear in the quiet of a court room, but it must place itself in the pilot house of the vessel and pass upon the situation as it appeared at the moment to the navigator, who must be accorded a reasonable discretion in selecting his time.

This Court has, in the case of the *Free State*, 91 U. S., 200, laid down the rule in the following language:

"It is not the rule of law, under the sixteenth of the articles enacted by Congress to avoid collision, when a steam vessel is approaching another vessel, and where a collision may be produced by a departure of the latter from the rules of navigation, that the former vessel is bound to slacken her speed, or stop and reverse. Each vessel may assume that the other will reasonably perform its duty under the laws of navigation, and if, upon this assumption, there could be no collision, the case under the sixteenth article does not arise. The steamer is not bound to take measures to avoid a collision until some danger of collision is present."

In the case of The *Delaware* 161 U. S., 469, Mr. Justice Brown says:

"If the master of the preferred steamer were at liberty to speculate upon the possibility, or even on the probability, of the approaching steamer failing to do her duty and keep out of the way, the certainty that the former will hold his course, upon which the latter has a right to rely, and which it is the very object of the rule to insure, would give place to doubts on the part of the master of the obligated steamer as to whether he would do so or not, and produce a timidity and feebleness of action on the part of both, which would bring about more collisions than it would prevent."

And concludes the discussion on this point by these words:

"In any event there is too much doubt about the fault of the *Talisman* to justify us in apportioning the damages."

See also The *Earl of Elgin*, L. R., 4 P. C., 7.

In The *Ceto*, 14 Ap. Cas., 670, Lord Hershell held:

"The necessity must not be such as to become manifest only when all the facts are ascertained. It must be such as would be apparent to a seaman of ordinary skill and prudence, with the knowledge which he possesses at the time."

In The *Emmy Haase*, L. R., 9 P. D., at page 83, the Court says:

"I may add that compliance with Rule 18, at the very moment when danger becomes apparent, is not necessary, for a man must have time to consider whether he should reverse or not. The Court is not bound to hold that a man should exercise his judgment instantaneously; a short, but a very short time, must be allowed him for this purpose."

The *Virgo*, 7 Benedict, 495.
The *Nereus*, 3 Benedict, 238.

Bearing these principles in mind, we now come to the testimony, and submit, with confidence, that not only is it not established by clear proof that the *Plymothian* was

negligent in the performance of her duties under R. 21, but that the great weight of testimony shows, on the contrary, that the measures to avoid collision were promptly taken on her part and efficiently carried out.

The *Plymothian* moving down, as we have shown, on the eastern side of the channel and the *Victory* moving up no further to the eastward of the channel than mid-channel, the vessels were thus on each other's port bow, and there was no risk of collision until this position was materially changed; consequently the *Plymothian* had a perfect right to assume that the *Victory* would perform her duties and keep her course, and was under no obligation either to slacken speed (moving herself moderately as we have shown) or to stop and reverse until the *Victory* commenced the eastward movement under her starboard helm.

It is to be remembered in this connection that the *Victory* was moving at about twice the speed of the *Plymothian*.

The evidence on the part of the *Victory* throws little light on this starboard helm movement of this ship; it all places her well over on the eastern edge of the channel from Craney Island up; in this respect it has been entirely discredited by the overwhelming weight of disinterested testimony, and in consequence has been utterly disbelieved by both the lower courts. We are forced, therefore, to refer to it only to see when the starboard signal of two whistles was sounded by the *Victory* and infer that the starboard movement began then or shortly before (Henley, 361, Mandon, 265).

The disinterested testimony of the *Victory*, considered even in this light, affords us little, if any, assistance; neither Swaine, Pratt, Page, Martin nor Tweddle give the position of the *Victory* when sounding her signals. Nor does Wigham on the *Princess;* South (R., 29), puts her four or five ship's lengths (*i. e.* 400 or 500 yards) from buoy 7 when she blew these signals; but Rankin on the same steamer, which was lying across the river from Lambert's Point pier, says (R., 31), that she was only distant from him a quarter of a mile when he heard these two blasts.

Of her crew three engineers, of course, know nothing

of her position then, nor do Stewart or Scott (R., 118). Candlish (R., 48), Gilbert (R., 71), agree with Captain Elcoate (R., 135), in saying that she blew these whistles when she was opposite the first schooner; and Elcoate continues to describe her position by saying that she was then five lengths (*i. e.* 500 yards) from buoy No. 7 (R., 135). Middleton says the *Victory* blew when the *Plymothian* was about half a mile off (R., 103); and Nelson (R., 330.) says she was about half way from Craney Island to buoy No. 7. But the matter is made more definite by Elcoate, the master of the *Victory* (R., 153), in the following testimony:

"Q. And what distance did you say the *Plymothian* was from you at the time the first signal was blown? A. I suppose *under half a mile; between a quarter and a half a mile.*

Q. When the first signal of two blasts was blown? A. Yes, sir; *about a quarter; nearer a quarter.*

Q. About a quarter of a mile? A. Yes, sir."

This tends to show that the movements of the *Victory* to the eastward were not made until the *Victory* was about 500 yards from buoy No. 7; and when the *Plymothian* was about 250 yards, making the distance between the vessels about 750 yards or less, as Elcoate himself admits.

The testimony of the *Victory* crew all agrees that there was a very short interval between her two sets of signals, and an equally short interval between the second set and reversing (Scott, R., 109); (Gilbert, R., 72); (Nelson, R.,341), and Elcoate (R., 135), and (R., 136), the latter stating the interval was about half a minute.

Special attention is called in this connection to the admission of Elcoate that he starboarded (R., 147), on sounding the two whistles and passing the first schooner, and to pilot Nelson, he says (R., 336):

"I did not want to run into her, because I saw the ship coming down on the Western side, *and of course I went to the eastern side* to give her room to go down to the west."

The testimony of the *Plymothian's* crew is all to the effect that this movement of the *Victory* to the eastward was sudden and not until the vessels were in close proximity, both in time and distance, to each other, and that immediately the engines of the *Plymothian* were reversed full speed and the helm thrown hard aport.

It will suffice to quote the testimony of her master and her pilot in this connection.

Mardon says (R., 265):

"We gave him the third whistle about a minute or a minute and a half after the second, and then heard two whistles and saw him starboard his helm. On hearing this cross whistle we blew three times and put the ship full speed astern. We had been straightened down the east side of the channel until we saw a collision was likely and then put the helm hard aport when we saw him come up on his starboard helm. The *Victory*—it is a little bit hard to judge of distance—but I should say was from 200 to 300 yards from us when we blew the whistles and put the engines full speed astern, and after the engines had been going astern a short while we heard him blow his signals and put his engines full speed astern, and he was coming up and hadn't time to stop before he was into us."

"Q. What effect did your engines being reversed have on your ship? A. From two to three minutes will stop her altogether. Q. How long after the engines were reversed before the collision happened? A. Nearly four minutes. About four minutes. Q. And you think her headway was checked for two to three minutes? A. Her headway was entirely checked before the collision."

Again, (R., 267-8):

"Q. I understand you heard no signals from her until you had blown three single blasts? A. Yes, sir. Q. Then you heard a cross signal? A. Yes, sir. Q. And then you gave the danger signal and put your helm hard aport, she giving three signals and reversing her engines? A. Yes, sir."

Again, on page 270, on cross-examination:

"She was coming up about the same until we heard her two whistles and saw her starboard her helm. Q. Was she coming up the mid-channel then all the time until you gave the two whistles, and at that time you starboarded?

A. Yes, sir; and went across the channel. Q. And those two whistles were given after you sounded the third whistle? A. After we sounded the third of our single blasts. As soon as the two whistles were blown, we sounded the danger signal and put our ship full speed astern."

So pilot Henley (R., pp. 360 to 364, 367 and 372) shows that this movement of the *Victory* under her starboard helm, to the eastward, with her cross signals did not occur until the vessels were about a thousand feet apart; that as soon as they were observed, the danger signals of the *Plymothian* were sounded, and her engines were stopped and reversed promptly and efficiently, and that, as the effect thereof, at the moment of collision, the speed of the *Plymothian* was fully checked, and she was positively making sternway.

That her headway was entirely checked at the collision has been shown by us in another connection. We again cite Lyons (R., 211), Baird (R., 232), Wood (R., 240, 239), Ham (R., 193), Etheridge (R., 355), Goodwood (R., 374-5), Clark (R., 388), Wynne (R., 405), and opinion of District Judge (R., 451).

It is submitted therefore, in the light of this testimony, that the *Plymothian* did not "doggedly" keep her course without taking any precautions whatever.

She had the right to assume, indeed it was her duty to assume, that the *Victory* would continue her course up mid channel, a position involving no risk of collision; and it was only encumbent upon her to adopt precautionary measures after the situation was changed by the action of the *Victory* to one of danger. She thereupon instantly stopped and reversed, and had become at the moment of collision, practically a stationary object. No court could require more of any vessel. It was impossible for her, with the *Victory* on her port bow, to have starboarded her helm and attempted to go to the westward. Such a movement would have resulted in an end-on collision, with more disastrous results to both vessels. Stopping and reversing was all that the law required, was all that the situation allowed, and by so doing promptly and efficiently, the *Plymothian* discharged her full obligation.

This is shown by the great preponderance of testimony; certainly there is a lack of *clear* proof to the contrary as required by the cases heretofore cited, especially the *Delaware* case. We cite also the case of The *Phœnix*, 58 F. R., 928, a case in which the District Court held only one vessel in fault, a delay in stopping and reversing being urged against the other. This decision was affirmed by the Circuit Court of Appeals in an opinion rendered by three Circuit Judges without dissent, the Court saying:

"But the testimony is in conflict upon the question of fact whether or not the master of the *Phœnix* delayed reversing, and, as the District Judge saw the witnesses, we accept his conclusion, since there is not a clear preponderance of proof the other way."

It is urged that there was no lookout specially stationed on the bow of the *Plymothian*, and that had one been so stationed, the first signals of two blasts, which neither the master nor the pilot of the *Plymothian* heard, would have been observed and possibly the collision might have been avoided by taking earlier steps.

It is true that there was no special man detailed and stationed on the bow to act as lookout; but the position was properly and efficiently filled by the master, Mardon, stationed well forward on the bridge in the best position to observe. Here there was no such conflict of duties as was the case on the *Victory* with Elcoate and pilot Nelson; with us the pilot, Henley, was navigating the vessel, and the master was keeping lookout and in no way interfering with the pilot's duties.

The testimony discloses the fact that the *Victory* blew two sets of starboard signals. The fault, if any, in not hearing these first signals contributes in no degree to the collision save in respect to not stopping and reversing earlier. It could have altered in no respect the course of the vessels, as we have already shown that it was impossible for the *Plymothian* to have done anything more than stop and reverse.

The witnesses from the *Victory* themselves show that the interval between these two sets of signals was very

short, about half a minute: Scott (R., 109), Gilbert (R., 72), Nelson (R., 341), and Elcoate (R., 135, and R., 136).

This is no less a time than should be reasonably allowed the navigator to observe the sudden movement of an approaching vessel and decide on his own best course (see the case of The *Emmy Haase*, *supra*).

The interval must be held too short to have constituted a fault contributing to the collision, especially in the absence of all proof, even attempting to show that by reversing earlier the *Plymothian* could have gotten out of the way of the *Victory* in her mad career. At most, the collision spot would have been shifted only a few yards to the southward, and the *Plymothian* would there have been struck with as great force as before.

For a loaded steamship of the size of the *Plymothian* to have done more in this interval of time and distance, after the starboard movement of the *Victory* was developed (a distance shown at the outside to be no greater than 250 yards), than have stopped her headway entirely at collision, as shown, was impossible. Having done this, her prompt action should be commended by the Court rather than held at fault.

The *Plymothian's* Helm.

The counsel for the *Victory* will doubtless in this Court, as in the lower courts, attempt to point out some discrepancies in the testimony of our witnesses in the matter of how the helm of the *Plymothian* was on the course down from the pier to the collision spot.

There may be some such discrepancies; with the number of witnesses examined, whose attention was directed to other occurrences at the time, it is only natural that there should be such. It would be highly suspicious if all the witnesses entirely agreed on this or any other point. But these discrepancies will be found on inspection to be slight and immaterial. The testimony of Captain Mardon and Captain Henley show very clearly the course taken by the *Plymothian*, and the manner in which her helm was operated, and it is entirely corroborated by the disinterested testimony produced in our behalf (see Mardon's

testimony R., 262 to 265, and 271, 272, also R., 273), where he says:

"Leaving Lambert's Point pier, the order was given to port until we got the ship's bow to buoy 9; then the order was given to hard aport; then, when we rounded number 9 buoy, the ship was headed straight up and down the channel, and the order was given to steady the helm, and the helm was kept steady to straighten down the east side of the channel, until we had gotten down close, after the whistles had been blown, then the helm was ported a little while, and then when the last whistles were blown and the engines put full speed astern, the wheel was put hard aport."

See also Henley, R., 367, 369.

The Log.

The fact that the log of the *Plymothian*, written up by the engineer after the collision, contains a full account of the movements of her engines from the moment of leaving the pier until after the collision, will doubtless also be the occasion for an attack on the part of counsel for *Victory*.

The chief engineer gives an entirely satisfactory explanation of this matter, stating that, as is the usual practice with all steamships, the orders from the deck are recorded by the engineer in charge of the engine, when received, on the bulkhead, or blackboard, in the engine-room, and from these entries the log is written; if nothing of moment transpires, only the main entry recording the departure of the steamship from port at full speed, is entered up; if, however, a collision or any other matter of importance occurs, that the full record, as shown on the bulkhead, is entered in the log; and that this was done on this occasion.

This attack is merely a device to forestall an attack on the logs of the *Victory*. His engineer's log (R., 163), fails to record such movements as should have been put on record, in view of such an important collision happening before the log is written up. Although elaborate testimony is given from the engine-room that the speed of the *Victory* was slowed down at Craney Island, and so con-

tinued for six minutes, and then, at exactly four minutes before the collision, the engine of the *Victory* was reversed, neither one of these important movements, which had such an influence on the serious collision that followed, find place or mention in the engineer's log of the *Victory*. No entry, from the time the ship left Hampton, at 3.30, until she struck, at 4.15, is found, save "working ship to order," and this, despite the fact that the log was not written up until after the collision, and the fact that Crowell, the engineer in charge of the engine-room, swore that he made a record of the movements (R., 83), at the time, and that it was in the log book; a statement which, on page 84, is explained by stating that he entered the time on the bunker, or side of the bulkhead, and then copied them and gave them to the chief engineer on paper, no scrap log being kept; when Paterson, the chief engineer, who wrote up the log book, is called on to explain why these records, which had been noted by the engineer at the time, were not included in his log, though written up afterwards, after this important collision had happened, with the full knowledge that every important fact would be the subject of a court investigation, he has no explanation whatever to offer (R. 89 to 92).

Can the Court pass, without comment, the failure of this officer, in charge of the records of the engine-room, to put down in such records the written notes handed him by the engineer in charge, after such a serious collision had happened?

Their deck log (R. 165) is just as imperfect and contains many statements which either prove the testimony of the crew willfully false or hopelessly unreliable. It unfortunately admits that the *Victory* was under starboard helm at and before she blew her first set of whistles; it says nothing as to their being forced over on the east side below Craney Island by passing steamers, and states that three steamers were passed to starboard, when it is in testimony that two of those passed to port; and it winds up with the statement that the *Victory* was making little or no headway *through the water* at the time of collision, when all of their witnesses state under oath, with one or two exceptions, that the *Victory* was making

sternway and that the *Plymothian* fell heavily on her bow with her port side practically under undiminished speed.

In conclusion we do not pretend in any degree to contend that all the statements of the twelve witnesses from the deck of the *Plymothian*, and ten disinterested witnesses, spectators, will agree in every detail, varying in no respect in estimates of distance or time; and had they sung the self-same song in every particular, their testimony would have been subjected to an even more severe attack, we doubt not.

What we have done, however, is to show, by the weight of testimony, from ordinary, every-day observers, mainly practical men, whose daily lives are led upon the waters of that river, that the facts contended for by us are true; that those asserted on behalf of the *Victory* have not been proved. This we consider we have done, and most effectually, in whatever way you choose to take the witnesses, applying whatever test the Court may see fit, taking either the whole list of witnesses for the *Plymothian*, against the whole list of witnesses for the *Victory*, or crew and pilot against crew and pilot, or disinterested testimony against disinterested testimony. The Court, we imagine, will be mainly guided by the testimony of these disinterested witnesses and the masters and pilots of the vessels.

Taken in that way, or in any other way, we are confident that we have the great weight of testimony with us.

Each fault ascribed to the *Victory* has been established; each charge made by the *Victory* against the *Plymothian*, namely, that she moved to the west side of the channel; that her whistles were defective; that she did not stop and reverse in sufficient time, has been entirely refuted.

This Court, as did the District Court, we feel, must hold that we are without fault; that we moved properly out from the pier down the proper side of the channel, giving the proper and lawful signals; that we stopped and reversed in the proper and lawful time; that while at least stationary in the water, in our proper position, we were wrongfully damaged by a steamer coming on her wrong side of the river, moving at an unlawful speed, after giv-

ing improper and unlawful signals, and after failing to adopt the proper precautionary measures, to prevent a collision, that are prescribed by law.

X.

Result of the decision of Circuit Court of Appeals much more disastrous to owners of *Plymothian* than contemplated by that Court.

It is believed that the consequences of the "modification" of the lower court's decree by the Circuit Court of Appeals are very much larger than were contemplated by the Court when rendering the decision. The opinion says (p. 503):

"The *Plymothian* was guilty of an act of omission. *The course of the Victory seems almost willful.* The *Victory*, no doubt, was the chief cause of the disaster. If the *Plymothian* had taken the precautions which she should have taken, the disaster might have been prevented. Under these circumstances, *it would seem to be manifestly inequitable to assess upon her one-half* of the entire loss."

It further says (p. 504):

"If the spirit of the rule be adopted, and the liability of each vessel be measured by its degree of fault, exact justice will be done by applying the stipulated value of the *Victory* ($67,500) to the loss sustained by the cargo, and by requiring the *Plymothian* to make up any deficiency (the cargo damage was $71,000), so that the cargo owners obtain complete indemnity."

Inferentially, the Court only intended to impose upon the *Plymothian* this deficiency of $3,500, with, perhaps, a slight addition for costs.

The Court, however, seems to have taken no account of interest; calculating that, it will be seen that the aggregate amount due the cargo owners as of October 30,

1894, the date of the final decree of the District Court, instead of being $71,000, was $86,152 03
Deducting the amount of *Victory's* bond..... 67,500 00

We find the deficiency to be..... $18,652 03

This does not take into account some deductions on account of costs which were allowed on the *Victory's* bond in the liability proceedings, so that the full recovery of the cargo owners against the bond of the *Plymothian*, should this decision be allowed to stand, will amount to the full sum of $20,000, with interest from October 30, 1894.

In the collision the *Plymothian* herself was severely damaged. These damages, as ascertained by the Commissioner, and adding interest to October 30, 1894, amount to the large sum of..... $49,108 90
Adding to this the above 20,000 00

We find the total damage accruing to the owners of the *Plymothian* to be..... $69,108 90

This is as of October 30, 1894, from which date it, of course, carries interest.

Thus the loss to these owners, under the so-called modifications, by the Circuit Court of Appeals, is larger by $3,000 than the bond of the *Victory*, and almost equals the loss to be borne by the *Victory's* owners, a result "manifestly inequitable," in the language of Judge Simonton.

This will be found also to be within a few thousand dollars of the amount that the *Plymothian* would have had to pay, had she been grossly at fault also in the collision, and had the damages been assessed equally between the owners of the two steamships.

Another effect of this modification is to cast the entire burden of this heavy and expensive litigation in the three Courts upon the owners of the *Plymothian*, a result most extraordinary and inequitable.

We shall leave the question of comparative negligence to be discussed in the brief to be filed by the learned counsel who appears with us in the case.

XI.

The steamship *Plymothian*, if at fault in the collision, is freed from responsibility to her cargo owners by the express provisions of her bills of lading.

For all the cotton that was on board the steamship *Plymothian* at the time of collision, there were issued by the master of the steamship at Galveston, bills of lading containing two clauses, familiarly known as the "Negligence" clause and the "Flag" clause.

The "Negligence" clause reads as follows:

"That the vessel shall not be liable for loss or damage occasioned * * * by collision, stranding or other accidents of navigation of whatsoever kind (even when occasioned by the negligence, default or error in judgment of the *pilot*, master, mariners or other servants of the shipowner.") * * * (R., 487-489-490).

The "Flag" clause is as follows:

"*This contract shall be governed by the law of the flag of the vessel carrying the goods*, except the general average shall be adjusted according to York-Antwerp Rules, 1890. In accepting this bill of lading, the shipper, owner and consignee of the goods, and the holder of the bill of lading, agrees to be bound by all its stipulations, exceptions and conditions, whether written or printed, as fully as if they were all signed by such shipper, owner, consignee or holder, any custom of the port notwithstanding" (R., 488-492).

The learned counsel for the cargo owners has contended in the lower courts that the greater part of this cargo of cotton was shipped under bills of lading which contained only the "Negligence" clause, without the "Flag" clause; an inspection of the record discloses that this contention cannot be successfully maintained.

By a stipulation between counsel (R., 483) it will be seen that, of the 3,682 bales of cotton constituting this cargo, 1,671 bales were shipped from Galveston under

bills of lading of the Texas-European Steamship Line, one of which bills of lading is printed in the record (pp. 485–488); these bills of lading all contain both the "Negligent" and the "Flag" clauses; so that as to these 1,671 bales there can be no question.

The other 2,011 bales of cotton were shipped from interior points on the Gulf, Colorado and Santa Fé Railroad on through bills of lading issued by this railroad company to the shipper, covering transportation via Galveston to Liverpool (Stipulation, 483).

The full form of this through bill of lading appears in the record (pp. 494–498); it contained the "Negligence" clause, but not the "Flag" clause, but has this stipulation prominently inserted therein:

"The property covered by this bill of lading is subject to all the conditions expressed in the customary forms of bills of lading in use by said steamships or steamship company at time of shipment."

These 2,011 bales, thus shipped, upon arrival at Galveston were delivered by the railway company to the steamship, and her master thereupon issued his ocean bills of lading, the full form of which is printed in the record (pp. 488–493).

They will be found as being used only in connection with the through bills of lading, and contain both the "Flag" clause and the "Negligence" clause; they contain also this further provision (R., 493):

"The goods referred to in this bill of lading are such portion of those mentioned in the through bill of lading, No. 48, Con. 287, dated Oct. 7, 1891, and shipped at Ardmore by N. P. Anderson & Co. (for SS. *Sandfield*), as have been actually put on board the steamer; but the said goods are only carried on the terms and conditions of this present Ocean Bill of Lading, and are to be delivered on the presentation of the said through bill of lading, and this Ocean Bill of Lading together; or upon the through bill of lading alone, provided that the master is satisfied by comparing the same with his copy of Ocean Bill of Lading, of the identity of the goods called for; and provided that the consignee gives a guarantee satisfactory to the shipowner against all claims by holders of the Ocean Bill of Lading, and to produce the latter in due course;

and indemnifies the owners and master against all claims by holders thereof, in consequence of delivery without production thereof."

Under the foregoing provisions of these bills of lading, used in connection with each other, and referring, in direct terms, to each other, it is submitted that the *Plymothian* is entitled to the exemptions contained in her ocean bills of lading.

By stipulation (R. 484), it is agreed that the *Plymothian* was at the time of the shipment of this cotton, and at the time of collision, a British vessel and sailing under the British flag. It was further stipulated that the law of Great Britain, in respect to the validity of the foregoing provisions and exemptions, may be proved by reference to decisions of the English courts.

It has not been contended that under the English law they are invalid.

We refer in this connection to the cases cited on page 15 of our petition for *certiorari*, and to the case of the Phœnix Insurance Co. against Liverpool *et al.*, Insurance Co., 129 U. S., 397.

This case therefore presents to this Court the question whether the "Negligence" clause, exempting a ship from responsibility for the negligence of a pilot which she was compelled to take, or of its own officers, navigating the ship in conjunction with such pilot, will be upheld as a valid contract between the parties, where the contract expressly provides that it is to be governed by the law of the country to which the steamship and the consignee of the merchandise both belong.

This question has very recently been most elaborately argued by eminent counsel before this Court, and is now under its advisement. We submit it therefore without further argument.

XII.

The decision of the Circuit Court of Appeals should be reversed and the decision of the District Court restored in its entirety.

Respectfully submitted,

WHITEHURST & HUGHES,
CONVERS & KIRLIN,
Proctors for S. S. Plymothian.

FLOYD HUGHES,
Advocate.

INDEX.

PAGE

Statement 1

Facts 6

Decree of District Court 10

Decree of Court of Appeals 11

POINTS:

I. Victory's navigation was reckless in the extreme 13

1. She was under the rule for steamers meeting head on or nearly so, and therefore bound to port and keep to the right. She starboarded and attempted to pass to the left 13

2. The Victory was to blame for attempting to cross the Plymothian's course without obtaining a previous agreement by whistle signals 30

3. She was in fault for too great speed in a channel way, and for failure to slacken speed or stop and reverse earlier 31

4. Her excuses amount to an acknowledgment of guilt 33

II. The faults of the Victory being clear and gross, the burden rests upon her in order to make a case for apportionment, to establish fault on the part of the Plymothian, by clear and convincing proof.

Because of the exception of *collision* in all the bills of lading, the cargo rests under the same burden 36

1. The rule as between the ships 36

2. The rule as against the cargo 36

III. The Plymothian was not in fault for failing to stop and reverse earlier 44

1. The Plymothian's course and speed 44

PAGE

2. The Victory's position when she sounded her first two-blast signal is involved in a conflict of testimony, but on the clear weight of the evidence she was then to the North of Craney Island 45

3. The Victory's course was along mid-channel or to the west of it, and was not such as to involve risk of collision until she made a change to port as under a starboard helm just before sounding the two-blast signal that Plymothian heard 52

4. The Plymothian was justified in presuming the Victory would pass port to port until some contrary sign appeared which produced an actual risk of collision 62

5. The Plymothian would not have been bound to stop and reverse at once if she had heard a prior two-blast signal from the Victory at the time she claims to have blown it 64

6. No fault on the part of the Plymothian has been established, nor indeed alleged, under Inspectors' Rule 3 67

7. The headway of the Plymothian was completely stopped at the collision 69

8. As to all the above matters the burden of proof is on the Victory and on the cargo. The evidence not only falls short of being clear and convincing that the Plymothian was in any fault contributing to the collision, but, as we submit, it affirmatively establishes the contrary 71

IV. The Court of Appeals erred in overruling the finding of of fact made by the District Judge on the conflicting evidence of witnesses produced before him, that the headway of the Plymothian was completely stopped at the time of collision 71

V. The Plymothian was not in fault on the score of lookout 74

PAGE

VI. The Plymothian, if in any degree at fault for the collision, is freed from responsibility to her cargo by the express provisions of the bills of lading under which she carried it 76

VII. If any fault be found on the part of Plymothian, it was slight as compared with the faults of the Victory, and the Court should therefore apportion the damages in accordance with the degree of the faults..... 91

1. The form of the decree entered by the Circuit Court of Appeals was erroneous, whatever rule of division may be adopted..... 91

2. The Court may divide the damages in any proportion it thinks proper..... .....

LAST POINT.—The decree of the Court of Appeals should be reversed, and the Plymothian absolved from all liability either to the Victory or to the underwriters on cargo, but if such a decree be not entered, then only the smallest amount of damages consistent with the equities of the case should be adjudged against her..... 91 99

Supreme Court of the United States,

OCTOBER TERM, 1896.

THE PORT OF PLYMOUTH STEAMSHIP COMPANY (LIMITED), Petitioner for limitation of liability as owner of S. S. *Plymothian*,

Appellant in this Court,

AGAINST

THE CANTON INSURANCE COMPANY (LIMITED) and others, Underwriters on Cargo, and JOHN MCINTYRE and others, owners of the Steamship *Victory*, Claimants,

Appellees in this Court.

No. 66.

JOHN MCINTYRE and others, Petitioners for limitation of liability, as owners of the Steamship *Victory*,

Appellants in this Court,

AGAINST

CANTON INSURANCE COMPANY (LIMITED) and others, Underwriters on Cargo, and PORT OF PLYMOUTH STEAMSHIP COMPANY (Limited), owner of Steamship *Plymothian*, Claimants,

Appellees in this Court.

No. 67.

BRIEF FOR PLYMOTHIAN.

Statement.

These proceedings were brought into this Court by writs of *certiorari*, issued to the United States Circuit Court of Appeals for the Fifth Circuit, in October, 1895.

The controversies presented grew out of a collision between the Plymothian and the Victory, in the channel of the Elizabeth River, near Norfolk, at about 4.15 P. M. of November 12, 1891.

The Plymothian, laden with a cargo of cotton and grain, was outward bound. The Victory was inward bound in ballast. The bow of the Victory penetrated the port side of the Plymothian, opposite the bridge, cutting into her below the water line, causing her to fill and sink shortly after the collision on the flats just outside the channel. Heavy damage to vessel and cargo resulted.

The Victory was also damaged about the bows.

The first libel was filed by S. Elcoate, master of the Victory, against the Plymothian, in the United States District Court for the Eastern District of Virginia, November 14, 1891 (p. 13). He alleged that the damages suffered by the Victory amounted to the sum of $10,000 (p. 13). This was followed on the 27th of November, 1891, by a libel filed in said District Court, by underwriters on the Plymothian's cargo, against both the Victory and the Plymothian, seeking to hold both liable for the damage to cargo, which was claimed to exceed $80,000 (p. 13).

Thereupon, and on the 3d of December, 1891, the petitioner, Port of Plymouth Steamship Company (Limited), filed a petition (p. 11) in said District Court, setting forth the proper jurisdictional facts, and

(1) Praying for a limitation of its liability for the damages growing out of the said collision; and

(2) Giving notice of its intention to contest its liability for any part thereof.

On the same day, John McIntyre and others, owners of the steamship Victory, filed a similar petition (p. 1).

Proceedings were then taken to appraise the amount or value of the owners' interest in the Plymothian and her pending freight (p. 481), which was fixed at $45,221, less $5,000 salvage, or $40,221 (p. 461).

Similar proceedings were taken to appraise the amount or value of the interest of John McIntyre and others,

owners, in the steamship Victory. The value of such interest was fixed at the sum of $67,500 (p. 459).

Thereafter, monitions were duly issued, requiring all persons having claims against the vessels, or their owners, to make due proof thereof (p. 481).

Pursuant to the monition issued in the proceedings of the Plymothian, claims were duly proved by the owners of the Victory, for their damages arising from the collision, amounting to $14,363.80 (p. 461), and by the Canton Insurance Company (Limited), and others, underwriters on cargo on the Plymothian, amounting to $71,420.97 (pp. 461, 462).

Pursuant to the monition issued in the proceedings of the Victory, a claim was duly proved by the Port of Plymouth Steamship Company (Limited), for its damage by reason of the collision, in the sum of $41.684.12 (p. 460). The Canton Insurance Company (Limited) and others also presented the same claims which they proved in the proceedings of the Plymothian (p. 460).

It will be perceived, therefore, that the damages which resulted from the collision, are:

Cargo damage	$71,420 97
Plymothian's damage	41,684 12
Victory's damage	14,363 80
Total damages (exclusive of interest	$127,468 89

The several claimants afterwards filed answers to the respective petitions for limitation of liability. The Canton Insurance Company (Limited) and others, answered the Plymothian's petition March 23, 1894 (p. 14). John McIntyre and others answered the same petition April 12, 1894 (p. 18).

The Canton Insurance Company (Limited) and others answered the petition of the Victory March 23, 1894 (p. 4). The Port of Plymouth Steamship Company answered the petition of the Victory April 14, 1892 (p 13).

The faults charged against the Victory in the pleadings of the Plymothian were:

(1.) In not keeping in a proper course on the right hand side of the channel

(2.) In not answering the single blast whistle signal from the Plymothian, and shaping her course accordingly.

(3.) In giving a cross-signal to the signals of one whistle blown by the Plymothian.

(4.) In proceeding in a channel way at an undue rate of speed.

(5.) In starboarding her helm and heading across the course of the Plymothian.

(6.) In not promptly stopping and backing (pp. 9, 12).

These faults were found against the Victory in both courts.

The faults charged against the Plymothian in the pleadings of the Victory were:

(1.) In not keeping out of the way of the Victory.

(2.) In not obeying the signal of two whistles, if the faint reply from her whistle was two signals.

(3.) In giving a cross-signal, if the same was a single whistle.

(4.) In not promptly stopping and backing.

(5.) In porting and throwing herself across the bows of the Victory (pp. 2, 19).

None of these charges was sustained by the District Court, and only the 4th in a modified form in the Court of Appeals.

The answers of the Canton Insurance Company (Limited) and others alleged faults against both vessels:

A.—Against the Victory:

(1.) In that she did not keep a good and sufficient look-out.

(2.) In that she was proceeding at too high a rate of speed.

(3.) In that she did not take a course up the western side of the channel.

(4.) In that upon receiving a signal from the Plymothian that she was proposing to go down the eastern

side of the channel, she did not at once assent thereto, and take the western side of the channel; or

(5.) If that was impracticable, that she did not instantly stop and reverse her engines, instead of persisting in proceeding up the eastern side of the channel (pp. 7–17).

All of these except the first appear to have been sustained in both courts.

B.—Against the Plymothian:

(1.) In that she did not keep a good and sufficient lookout.

(2.) In that she did not give earlier signals to the Victory that she proposed to go down the eastern side of the channel.

(3.) In that she did not, when the Victory failed to reply to her signal, or at any rate, when the Victory gave the signal of two blasts, indicating that she was proposing to go up the eastern side of the channel, instantly stop and reverse.

None of these was sustained *eo nomine* in either court. The Court of Appeals found the Plymothian guilty of "an act of omission"—something less than a fault—in not stopping earlier.

Upon the issues thus presented, the cause went to trial before Judge HUGHES, April 20, 1894 (p. 305).

The following witnesses were examined by the respective parties:

A.—By the Plymothian:

Henley, Pilot (p. 359).
Mardon, Master (p. 260).
Ham, Chief Officer (p. 183).
Wood, Second Officer (p. 237).
Scullard, Chief Engineer (p. 165).
Cronquist, Second Engineer (p. 173).
Pearse, Third Engineer (p. 178).
Lyons, AB., Wheelman (p. 208).
Baird, AB. (230).
Hendema, AB., Second Wheelman (p. 219).
Ecrath, Carpenter (p. 255).
Schroder, Steward (p. 201).

Brown, Craney Island Lighthouse Keeper (p. 346).
Goodwin, Captain tug *Commodore* (p. 372).
Etheridge, Mate of the tug *Commodore* (p. 353).
J. I. Clark, Captain tug *Mary & Joe* (p. 387).
J. M. Clark, Captain tug *Pioneer* (p. 400).
Harrison, Engineer, tug *Pioneer* (p. 404).
Wynne, Captain tug *Lumberman* (p. 403).
Harney, Captain Steamer *Luray* (p. 433).
Channel, Mate of the Steamer *Olive* (p. 428).
Page, Real Estate Agent (p. 313).
Sanford, Lloyd's Surveyor (p. 413).
Quigley, Jr., Shipwright (p. 419).

B.—By the Victory:

Nelson, Pilot (p. 329).
Elcoate, Master (p. 129).
Candlish, Chief Officer (p. 32).
Stewart, Second Officer (p. 117).
Gilbert, Third Officer (p. 60).
Pattison, Chief Engineer (p. 88).
Crowell, Second Engineer (p. 82).
Munro, Third Engineer (p. 85).
Middleton, AB. (p. 94).
Scott, Fireman (p. 107).
South, Mate steamer *Princess* (p. 25).
Wigham, Second Mate steamer *Princess* (p. 21).
Rankin, Second Engineer steamer *Princess* (p. 30).
Swain, Captain tug *Storm King* (p. 289).
Pratt, Captain steamer *Wanderer* (p. 305).
Wood, Foreman Boilermaker (312).
Martin, Lambert's Point Lighthouse Keeper (p. 318).
Tweddle, Clerk (p. 324).
Pebworth, Engineer steamer *Virginia Dare* (p. 423).

Statement of Facts.

The following facts appeared:

The Victory was a British steamer, of 1,774 tons net tonnage, 338 feet in length, 38½ feet in breadth, inward bound in ballast, drawing 17 feet aft and 13 feet forward. Her officers and crew numbered thirty-one all told.

The Plymothian was a British steamer of 1,016 tons net register, 260 feet long, laden with a cargo consisting of 3,682 compressed bales of cotton (p. 448). Her officers and crew numbered twenty-one all told. She was out-

ward bound from Galveston for Liverpool (p. 485), having put into Norfolk for bunker coal. Her draft was 14 or 16 feet (p. 370). Both vessels were in charge of pilots.

The collision occurred in a straight stretch of the channel of Elizabeth River, between Craney Island Lighthouse and the turn in the channel at the buoys opposite Lambert's Point. There are two of these buoys, a red one numbered 22, known as the Merrimac buoy, on the westerly side, and a black one numbered 9, on the easterly side. The distance from buoy No. 9 to Craney Island Lighthouse is 1,967 yards on the chart (Exhibit X. (p. 480), Appendix), or about a mile and an eighth (p. 449). The course is N. ½ E. and S. ½ W. The channel and buoys are shown on the lithographed section of chart No. 403 (which is also an exhibit, p. 480), at the end of this brief.

The place of the collision was at black buoy No. 7, at the extreme *easterly* edge of the eighteen foot curve of the channel, 1,200 yards south of Craney Island Lighthouse, and 767 yards north of black buoy No. 9.

The channel is 250 yards wide at Craney Island, and broadens to 450 yards at buoy No. 9 (p. 448).

The Plymothian had been taking coal at Lambert's Point pier, a short distance southeastward of buoy No. 9. She left the pier at 4 P. M., heading out off the buoy, her course from the pier to the turning point down the channel being northwesterly at an angle of 45 degrees to the axis of the channel (p. 448). The usual departing whistle signal was blown as she moved away from the pier (p. 300). Proceeding outwards to round buoy No. 9, with the helm slightly aport (pp. 263, 300, 184, 238), the engines were at half speed until the buoy was close aboard off the starboard bow (pp. 263, 360). The engines were then put at full speed and helm hard aport (pp. 263, 360, 282). A strong flood tide was running southward with a force of about two knots (pp. 37, 360, 361). This swept the ship's stern right up, bringing her head northward and straight down the channel (p. 360). She rounded buoy 9 inside of a ship's length off (pp. 202, 209, 220, 231, 238, 263, 360, 353, 373, 389, 395, 401, 431), and when abreast of it steadied her helm (pp. 263, 300, 214, 219), on a course straight down

the right hand or easterly side of the channel (pp. 360, 365, 268, 280, 424, 429, 353, 354, 373, 402, 395, 404, 209, 184, 203, 231, 238).

Both of the lower courts have so found (pp. 450, 449, 499).

At this time the Victory was seen both by the captain and the pilot of the Plymothian to be coming up the channel (southward) below Craney Island Light (pp. 365, 264), to the westerly side of mid-channel, and on their port bow (pp. 361, 362, 264). The Plymothian thereupon blew a passing signal of one whistle just as she passed buoy 9 (pp. 264, 360, 361, 424, 404, 238, 231, 229, 202, 353, 373, 338, 390, 400), and a minute later repeated it, without receiving any reply from the Victory (pp. 360, 361, 264, 265).

The vessels were clearly over a mile apart at this time, with a bend in the channel between them (p. 354 also chart). The wind was southwesterly with force enough to enable sail vessels to make two or three knots against the tide (p. 47). It may be that the vessels were then beyond the range of ordinary whistles, or that the sound was deflected by the wind. Neither, at this time, heard any whistles from the other.

The Victory meantime had been maintaining her general course, so as to pass well clear port to port (pp. 210, 239, 221). She had ported her helm (presumably in rounding the bend at Craney Island buoy), so as to show the whole of her port side and port quarter to those on the Plymothian (pp. 361, 363). The Victory, indeed, admits straightening up to the channel course of S. ½ W. from Craney Island up (pp. 332, 335), which necessarily implies a porting at the lighthouse.

The Plymothian, after proceeding some distance straight down the starboard side of the channel, ported more towards the east bank (pp. 273, 367, 369). As the vessels were thus proceeding on safe lines port to port (pp. 361, 264, 210, 239, 221, 231, 236), the Victory about three minutes after porting at the lighthouse made a perceptible change of course towards the easterly side of the channel as if under a starboard helm (pp. 361, 265). On seeing the

change, the captain of the Plymothian said to the pilot: "Pilot, what is that fellow doing?" (p. 361). The pilot at once blew another single blast on his whistle (p. 361), and receiving two in reply (p. 361), immediately reversed his engines, sending them full speed astern, blew a danger signal of three blasts of the whistle, and put the helm hard aport (pp. 361, 265). The Victory a minute or more later (pp. 364, 265; Candlish, pp. 51, 56; Elcoate, p. 136) also blew a danger signal, and then or shortly afterwards claims to have reversed her engines three lengths away from buoy 7 (p. 136), but not in time to stop her headway, due to high speed and the force of the flood tide (*vid.* Nelson, 333; *Tweddle*, pp. 325, 328).

The Plymothian, under the influence of reversed engines and hard aport helm, came to a standstill before the collision, with buoy 7 close under her starboard bow (pp. 211, 232, 240, 239, 193, 355, 374-5, 388, 405; Op., 451), but the Victory came on, colliding with her port side at the bridge at an angle variously estimated at from 45 to 60 degrees, penetrating about fifteen inches into the strongest part of the ship, through her three steel decks, her stringer plates and beams. The force of the blow threw the Plymothian's head around to starboard, so that buoy 7, which prior to the collision had been under her starboard bow, was seen by the Victory's witnesses and others to come around in *front* of the Plymothian's stem to her port bow (pp. 40, 50, 161, 220, 274, 275, 338). This showed conclusively that the Plymothian was fully stopped, and probably making some sternway when the blow was received.

It was found that the Plymothian was rapidly filling with water, and to prevent her sinking in the channel, her engines were put full speed ahead until she grounded on the mud flats to the eastward of the channel, where she sank in shallow water, filling fore and aft. She was subsequently raised by aid of salvors, repaired temporarily at Newport News, and finally in England on completion of the voyage.

The Victory, although damaged about the bows, was able to proceed to Norfolk. She was also temporarily repaired at Newport News, and finally repaired in England.

The District Judge, finding the facts substantially as above stated, held the Victory solely in fault for the collision, and decreed a recovery by the owners of the Plymothian, and the owners of her cargo, *pro rata*, to the extent of the bond filed by the owners of the Victory, in their limitation proceeding. The figures of his decree were as follows:

Amount required to be paid in by Victory, less costs incidental to establishing the right of limitation of liability ($67,500 less $1,138.48)		$66,361 52
Of this sum, the owners of the Plymothian were adjudged entitled to recover		24,478 78
Canton Ins. Co.	$5,281 23	
Triton Ins. Co.	2,640 61	
Indemnity Mutual Marine Co.	8,896 43	
Atlantic Mutual Ins. Co.	1,981 88	
London Assurance	5,512 72	
C. T. Bowring & Co.	1,043 09	
Standard Marine Ins. Co.	5,152 63	
British & Foreign Marine Ins. Co.	1,283 15	
Insurance Co. of North America	10,091 00	
		41,882 74
		$66,361 52

The Canton Insurance Company (Limited) and others, underwriters on the cargo, as well as the owners of the Victory, appealed from the decree of the District Court to the Circuit Court of Appeals for the Fourth Circuit. That Court affirmed the decree below, so far as concerned the faults found against the Victory. As to the Plymothian, it held that "it would seem to be manifestly inequitable to assess upon her one-half of the entire loss" (p. 503), yet found she was guilty of "an act of omission" (p. 503), not clearly pointed out in the opinion. In the result, the decree of the District Court was modified by awarding the

whole of the Victory's bond to the cargo, imposing upon the Plymothian the whole burden of her own damages ($41,500), and requiring her to make up the deficiency of the cargo damage.

The result of the Court of Appeals decision to the Plymothian (excluding the costs in the Court of Appeals, which are not shown), was as follows:

Cargo damage to be recovered (p. 460).....		$71,420 97	
Interest thereon from December 1, 1891, to the date of the final decree, June 10, 1895 (pp. 513, 515)...	$15,117 44		
Costs awarded (p. 514)	1,287 18		
		16,404 62	
			$87,825 59

The amount of this decree to be paid by the *Victory* was:

Value of her bond.....	$67,500 00		
Less costs of establishing her limitation from liability.	1,138 48		
		$66,361 52	
Interest from October 30, 1894, to June 10, 1895.....		2,433 26	
		$68,794 78	
Less costs paid to *Plymothian* in District Court.....		840 90	
			$67,953 88
Deficiency to be made good by *Plymothian*.....			$19,871 71

The loss to the *Plymothian* on the face of the decree was, therefore, her recovery against the *Victory* in the lower Court....	$24,478 78	
And the Cargo Underwriters' deficiency, required to be made up...	19,871 71	
Total.....		$44,350 49

Expressed in another way, she was required to bear the whole of her own damage.....	$41,684 12	
And to pay the Underwriters on cargo.....	19,871 71	
Making her whole burden under the decree of the Court of Appeals, exclusive of interest..		$61,555 83

These damages were imposed upon the Plymothian by the Court of Appeals, in consequence of "an act of omission" (p. 503), a sort of blemish on her navigation so

slight that "it would seem to be manifestly inequitable to assess upon her one-half of the entire damage" (p. 503).*

The Port of Plymouth Steamship Company, Limited, sued out a writ of *certiorari* in No. 66, and John MacIntyre and others sued out a writ in No. 67. The cases have now come on to be heard upon the return to those writs.

---

* A division of damages under the ordinary rule, as of date November 12, 1897, six years after the date of collision, counting in interest on all items up to that date, would be substantially as follows:

Cargo loss (p. 460)	$71,420 97		
Interest	25,711 55		
		$97,132 52	
Plymothian's damage (p. 460)	$41,684 12		
Interest	15,006 24		
		56,690 36	
Victory's damage (p. 461)	$14,363 80		
Interest	5,070 96		
		19,434 76	
			$173,257 64
Total damages			$173,257 64
Half damages to each			$86,628 82
Damages suffered and paid by *Plymothian*			56,690 36
Balance to pay			$29,938 46

POINTS.

I.

The Victory's navigation was reckless in the extreme.

1. *She was under the rule for steamers meeting head on or nearly so, and, therefore, bound to port and keep to the right. She starboarded and attempted to pass to the left.*

The question as to what rules the vessels were bound to observe at and shortly before the collision, a matter considered at some length in the decisions of the District Judge, and of the Court of Appeals, is now decided by the case of the *Delaware*, 161 U. S., 459. The vessels were in pilotage waters, in the command of pilots, and were, therefore, under R. S., Sec. 4233, the rules of the Supervising Inspectors, and the custom or usage generally followed in the navigation of Elizabeth River.

(**a**.) RULE 18 of Section 4233 provides as follows:

"If two vessels under steam are meeting end on, or "nearly end on, so as to involve risk of collision, the "helms of both shall be put to port so that each may pass "on the port side of the other."

(**b**.) The rules of the Supervising Inspectors which were put in evidence (pp. 344, 345, 430, 431, 432), provide:

"RULE I. When steamers are approaching each other 'head and head' or nearly so, it shall be the duty of each steamer to pass to the right or port side of the other; and the pilot of either steamer may be first in determining to pursue this course and thereupon shall give as a signal of his intention one short and distinct blast of his steam whistle, which the pilot of the other steamer shall answer promptly by a similar blast of his steam whistle, and thereupon such steamers shall pass to the right or port side of each other; but if the course of such steamers is so far on the starboard of each other as not to be considered by pilots as meeting 'head and head' or nearly so, the pilot so first de-

ciding shall immediately give two short and distinct blasts of his steam whistle, which the pilot of the other steamer shall answer promptly by two similar blasts of his steam whistle, and they shall pass on the left or on the starboard side of each other.

"NOTE.—In the night, steamers will be considered meeting head and head so long as both the colored lights on each are in view of the other.

"*Second situation* (see diagram p. 345). Here the *green light only will be visible to each*, the screens preventing the red light from being seen. They are therefore passing to starboard, which is rulable in this situation, *each pilot having previously signified his intention by two blasts of the steam whistle.*"

"RULE II.—When steamers are approaching each other *in an oblique direction* (as shown in diagram of the fourth situation), *they shall pass to the right of each other, as if meeting head and head or nearly so*, and the signals by whistles shall be given and answered promptly as in that case specified."

"RULE III.—If when steamers are approaching each other, the pilot of either vessel fails to understand the course or intention of the other, whether from signals being given or answered erroneously, or from other causes, the pilot so in doubt shall immediately signify the same by giving several short and rapid blasts of the steam whistle; and if the vessels shall have approached within half a mile of each other, both shall be immediately slowed to a speed barely sufficient for steerage-way until the proper signals are given, answered and understood, or until the vessels shall have passed each other."

(**c**.) It was proved, and not disputed, that by a custom, known to the captain of the Victory, steam vessels passing through this channel in opposite directions were bound to keep to the right.

On this subject Captain Mardon, of the Plymothian, testified (pp. 268, 269):

Cross-examined by Mr. Sharp:

"Q. You say, captain, that it was the duty of the Victory from the time she passed Craney Island all the way up to keep on the west side of the channel? A. No; I don't say from the time she passed Craney Island. I say from the time she got under way in Hampton Roads up to

Lambert's Point she ought to have kept on the west side of the channel.

"Q. You say it was her duty from the time she hove anchor in Hampton Roads to Lambert's Point to keep on the west side of the channel? A. Yes, sir.

"Q. And it was the duty of the Plymothian—— A. Or any other steamer to keep down the eastern side.

"Q. We are speaking of the Plymothian. It was the duty of the Plymothian to keep on the east side going down under all circumstances? A. Yes, sir.

"Q. Under all circumstances as to each; that is your idea of the way that river ought to be navigated? A. Yes, sir.

"Q. Whether practical or not? A. There are states of danger when you have to vary from your course to save a collision.

"Q. The only navigation (of the Plymothian) as far as the helm was concerned, was to keep on the east side of the river? A. Yes, sir" (pp. 268, 269).

"The east side was our proper course. I looked down there more especially to see that it was clear" (p. 270).

"Q. If you were coming up the channel from Hampton Roads and saw a vessel coming out from Lambert's Point pier dock, which side of the channel would you assume that vessel would take, after she got steady? A. Down the east side.

"Q. You would expect her to go down the east side? A. Yes, sir, and act accordingly" (p. 280).

"Q. What consultation did you have with the pilot on that day in reference to going down the east side? A. Had none.

"Q. Did you express those views to him? A. No, sir.

"Q. Did he communicate to you what the rule was in regard to the western side? A. He did not communicate to me, because he knew I knew as well as he did.

"Q. How did you acquire that information? A. By ten or twelve years in this country, being here several times and at Newport News.

"Your idea is—— A. By the United States law, a ship going down——

"Q. State the law? A. Coming up, leave the red buoys on the starboard bow; going down, keep the black buoys on the starboard bow" (p. 277).

Pilot Henley, of the Plymothian, who has since been elected one of the Board of Pilot Commissioners (p. 359), also testifies to the usage (p. 372):

"Q. Why did you take the eastern side? A. That is the proper side for a man to take, if it is clear to take that side.

"Q. And coming up, vessels take the western side? A. Yes, sir.

"Q. That is the regular course of navigation in all channels? A. Yes, sir.

"Q. Each vessel takes the starboard side? A. Yes, sir.

"Q. Even if the starboard side makes them take a little longer course than to take the other course? A. Yes, sir."

This evidence is not disputed, and the custom is proved to have been known to Captain Elcoate of the Victory.

"Q. You have been in Norfolk before? A. Been running here ever since these last five years" (p. 151).

"Q. And you are acquainted, I suppose, with the rule of the road that in rivers and narrow channels the vessel bound down shall go the right and the vessel bound up shall go to the right? A. Yes, sir; where practicable.

"Q. You made no effort on that occasion to go to the right? A. We kept in the mid channel when the mid-channel was clear. * * *

"Q. Did you make any suggestions to him (pilot) that he should keep over to the right? A. Not one.

(**d**.) The vessels were approaching each other in such directions and with such bearings as required both, under the above rules and custom, to keep to the right.

Their positions when the Victory was to the north of Craney Island Light, and the Plymothian to the south of buoy No. 9, are unimportant. The distance between those points is a mile and an eighth. The testimony establishes and both the lower courts have found, that when the Plymothian was at buoy 9 nearly opposite the breakwater off Lambert's Point pier, the Victory was a short distance to the north of (p. 365) or near Craney Island (*vid. post*, pp. 45-58).

(**e**.) When the Plymothian straightened down the channel opposite and close to buoy 9, she was near the eastern side and headed straight down on the channel course N. $\frac{1}{4}$ or $\frac{1}{2}$ E. (pp. 360, 365, 268, 280, 209, 184, 203, 231, 238, 424, 429, 353, 354, 373, 402, 395, 404). The course

from the north side of the coal pier, at which she had been lying, out to buoy 9, was one of about 45 degrees to the axis of the channel (p. 448). In rounding the buoy, she had, therefore, to make a swing of four points. She did not, however, proceed directly to the buoy on a straight line, and make her swing from there, as contended by the Victory, but commenced to port her helm immediately on leaving the pier (Mardon, p. 263; Henley, p. 300; Ham., p. 184; Wood, p. 238). On nearing the buoy, it was hard ported (Henley, p. 360; Lyons, wheelman, p. 209), so that her swing to the channel course was completed, and the helm was steadied with the vessel's head pointing straight down the channel just as the steamer passed buoy 9 (Henley, p. 360; Mardon, p. 263; Lyons, p. 209).

On passing buoy 9, her own witnesses show that she was well on the eastern side of mid-channel. Pilot Henley says they passed from 40 to 60 feet of the buoy (p. 360). Captain Mardon says from 20 to 30 feet (p. 263). Second officer Wood says 20 feet (p. 234). Lyons, wheelman, says: "We passed close upon the buoy" (p. 209). Hendema, second wheelman, says 50 feet (p. 220). Baird, A. B., says 40 or 50 feet (p. 231). Schroeder, steward, says may be 50 feet (p. 202).

The independent witnesses speak to the same effect.

Mate Etheridge, of the tug *Commodore*, which was on the western side of the channel, a little above the Merrimack Buoy, No. 22, estimates that the Plymothian passed within 50 or 75 yards of buoy 9 (p. 353). Captain Goodwin of the same tug estimates that she passed it "Not over 50 yards," possibly less (p. 373). J. I. Clark, captain of the tug *Mary and Joe*, who was standing on the north side of Lambert's Point pier, in a position to see everything that happened in the river at that point, says she rounded buoy 9 about half of her length off (130 feet) (p. 389). Harrison, engineer of the tug *Pioneer*, which he says was pretty near abreast of the black buoy at Lambert's Point, and to the east of it (p. 394), says the Plymothian passed within 35 or 40 feet of the buoy (p. 395). Captain J. M. Clark of the same tug, who places his vessel

just below buoy 9 (p. 400), estimates the distance at not over 50 yards at the outside (p. 401).

Channel, mate of the *Olive*, bound down the river at the time, says he passed the Plymothian close to buoy No. 9, and left her on his starboard side. "It looked to me she was hugging the buoys pretty close."

The contention set up by the Victory in her pleadings, and which her officers and crew attempted to sustain, that the Plymothian was swept over to the westerly side of the channel in rounding buoy 9, was negatived by her pilot, Nelson, who, though placing her somewhat further out in the channel, yet in the main corroborates the witnesses for the Plymothian. Nelson says:

"Q. When did you first see the Plymothian? A. Saw her coming out of the slip.

"Q. What slip? A. Lambert's Point pier. * * *

"Q. You saw her go over from Lambert's Point pier? A. Yes, sir, *and straightened down the middle of the channel*" * * * (p. 331).

"Q. You noticed when she came out and got about mid-channel, she hung in mid-channel some time, and then she went to the eastern side? A. Yes, sir.

"Q. You don't desire to correct that in any way? A. No, sir.

"Q. And as for the period she was hanging in mid-channel, it may have been a minute or two? A. Going down, sir.

"Q. Hanging down the mid-channel? A. Yes, sir.

"Q. And that was about one or two minutes? A. Yes, sir, I suppose so (p. 342).

The width of the channel at buoy 9 is about 450 yards (p. 348); hence Nelson's evidence would have put the Plymothian, when rounding, to about 200 feet off buoy 9.

On this evidence the District Judge found (p. 450) that—

"The Plymothian had not * * * in coming out from Lambert's Point, gone over to the west of the channel, near to red buoy 22, and had not after doing so recrossed the channel to reach its position near buoy 9, as claimed by the Victory's counsel. The tide was not strong enough to force her over there, and it would have been out of her course to have gone there. The testimony is conclusive to that effect."

Both of the lower Courts found that the Plymothian was always on her own side of the channel.

(f.) Victory after rounding the bend at Craney Island was west of mid-channel, heading up the channel course. Her pilot says that *below* Craney Island Light he had been keeping *on the western side* of the channel (p. 335); that he passed a river steamer at Craney Island (335), and another about a hundred yards behind the first (p. 335). When he came to them he was in midchannel.

"Q. Before you met these steamers were you on the middle of the channel, the east or west side? A. *Middle of the channel*" (p. 336).

Captain Elcoate says no change of helm was made for those steamers (p. 152).

On examination of the channel of the Elizabeth River (shown in Exhibit X, in Appendix to this brief), it will be seen that the vessels, as placed by Nelson, the Plymothian near mid-channel, about opposite buoy 9, and the Victory in mid-channel, after porting around the bend near Craney Island (pp. 332, 335), if steering the channel course, as both concede they were (Henley, pp. 360, 365; Nelson, 332, 335), would be exactly head to head.

The evidence of other witnesses shows they were so. Captain Mardon (pp. 264, 270), pilot Henley (pp. 361, 363, 366, 368), mate Etheridge of the *Commodore* (pp. 354, 358, 359), engineer Harrison of the *Pioneer* (p. 399), and Captain Wynne of the *Lumberman* (p. 411), who were from a half mile to a mile away at the time, but in favorable positions for observation, place the Victory in mid-channel at the time of passing Craney Island.

Brown, keeper of Craney Island Light, standing on his platform at the lighthouse as the Victory passed, noticed her on account of her excessive speed, and observed that she was then *closer to the western* or starboard bank of the channel than he thought was safe (pp. 346, 348).

Mate Channel of the steamboat *Olive*, who passed down

and had met the Victory in the neighborhood of Craney Island, passing her *port to port* (p. 428), said:

"She looked to me she was just about as close on Craney Island as she ought to have been" (p. 429).

Captain Harney of the steamboat *Luray*, who passed the Victory *port to port* just below Craney Island (p. 433), says she was then "a little on the starboard hand of the channel, coming up, *on her starboard side of the channel*" (p. 433).

Captain Goodwin of the *Commodore*, himself on the western side of the channel, says:

"Q. How was he (Victory) in respect to the channel when he passed Craney Island—was he on the middle or on the east or west side? A. *He was on the west side* (p. 375)."

This evidence, for the most part disinterested, which is not seriously disputed, except by those on the Victory's deck, fully confirms the evidence of Captain Mardon, of Pilot Henley, and of the other witnesses for the Plymothian, that when the Victory was in the neighborhood of Craney Island, she was certainly not to the eastward, but probably was to the westward of mid-channel, was well on the Plymothian's port bow, and, therefore, by all rules, bound to keep to the right.

(g.) The courses of the vessels from the time the Plymothian passed buoy 9, and the Victory passed Craney Island, are not in reality very much in dispute.

It is true the Victory's witnesses say they were at that time and afterwards on the easterly side of the channel, but the Court will see by reference to chart, Exhibit, X, that there are no buoys at that place on the easterly side. As they were not acquainted with the width of the deep water channel apart from information shown by buoys, they had nothing to go by in forming their estimate except buoys 7 and 9. But as the channel is somewhat narrower at buoy 7 than at buoy 9, the witnesses would have to be to the westward of mid-channel at Craney Island in order to see through between those

two buoys. A line drawn to the eastward of buoy 9, passing close to the westward of buoy 7, would lead to the westward of mid-channel at Craney Island.

The evidence already referred to shows that they were certainly not to the eastward of mid-channel when opposite the lighthouse; certain circumstances testified to by themselves also show it. They admit starboarding twice for different schooners and hard starboarding just before the collision, making a change, on their own admissions, of a point and a half (pp. 337, 137, 147, 34, 37, 47, 62, 63, 78), and on the facts, unquestionably something more; yet they place the heading of their vessel at the point of collision as S. S. E. (Elcoate, p. 138; Candlish, 161). Heading the vessel in that direction at the buoy as we have done on the diagram submitted herewith, and working her course backwards, we find she would be in mid-channel in about three times her length northwestward of the place of collision.

If she had been on the east side of the channel at Craney Island within forty feet of the bank, as testified, it would have been impossible for her to have been at the place of collision heading S. S. E. On the contrary, she would have been ashore from a quarter to a third of a mile to the northward of that place..

Both of the lower courts, on an overwhelming weight of evidence, have found that the Victory was not prevented by other vessels in the channel either from going on the westerly side or from staying there (pp. 451, 502), whilst the pilot virtually admits that his object in heading over for the easterly side of the channel just before getting to buoy 7, was to cut off some of his distance into port by passing close to buoys 7 and 9, instead of running the extra distance that he would have had to run by keeping on the westerly side of mid-channel around the bend at Lambert's Point (p. 337).

It is apparent, as the learned District Judge remarked, that—

"The thoroughly disproved testimony given by her [Victory's] master and the deck witnesses of her crew * * * has no other value in the case than to show

that these witnesses felt the pinch of Article 21 (International Channel Rule) and made desperate efforts to excuse the obstinate and fatuous perseverance of their navigators in keeping on the eastern, and to them, as they well knew, the contraband side of the channel."

(b.) The meeting rule (No. 18), as was held in the opinion of the Court of Appeals (p. 501), required both vessels on approaching to port their helms and pass port to port. The first rule of the Supervising Inspectors is to the same effect.

Counsel for the Victory seeks to avoid the application of these rules by contending that the Plymothian was so far to the westerly side of mid-channel, and the Victory so far to the easterly side, as to make a case under the "First Situation," illustrated by the Supervising Inspectors (p. 345), that is, a position such, that had it been dark, the vessels would have been green to green. But even then, passing starboard to starboard, is permissible conditionally only—"*each pilot having previously signified his intention by two blasts of the steam whistle.*"

No such agreement having been reached, the Victory plainly had no right to act on the assumption that the vessels were within that rule. In fact, they were not. The proofs clearly show that the vessels were never in that situation after the Plymothian had rounded buoy 9, and was straightened down the channel, and Victory had rounded Craney Island (p. 339), and straightened up S. ½ W. (pp. 332, 335).

All the evidence agrees that a few minutes after straightening down, Plymothian ported a little, and then hard ported. Therefore, even if the Victory was heading at a gradual angle across the channel all the way from Craney Island, as is argued, the vessels would have been approaching each other in an oblique direction, which would have brought Inspectors' Rule 2 (p. 430) into operation, and under that rule "*they shall pass to the right of each other, as if meeting head and head, or nearly so.*" Both courts have found that there was nothing in the way of their doing so (pp. 451, 502). The starboard hand rule does not apply to cases of vessels approaching around bends in channels (The *Velocity*, 3 P. C.,

44; The *Ranger*, 4 P. C., 519; *Marsden*, Coll. (3d Ed.) 344, 427, 466, 468, 513). It is assumed they will conform their courses to the channel bank, and meet as if head and head.

(**i**.) The District Judge considered that the vessels were bound to observe the provisions of Article 21 of the Regulations of 1885, which provides:

"In narrow channels every steamship shall, when safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such ship."

The Court of Appeals was apparently of the same opinion (pp. 500, 501), and said (p. 501):

"Whatever construction we may give to these words, if we conclude that the Victory, in Elizabeth River, was governed, not by the regulations of the Act of 1885, but by the regulations theretofore in force, embraced in Section 4233 of the Revised Statutes, we will find in those regulations the same rule prescribed which the learned Judge enforced here, 'Keep to the right.'"

By this it is assumed the Court meant to find as a fact that the vessels were approaching each other either (1) head and head, or nearly so, and therefore bound to port and pass to the right by Rule 16; or (2) that they were approaching in oblique directions, and therefore bound, under Rule 2 of the Supervising Inspectors, to port and keep to the right, and (3) that there was nothing to prevent her doing her duty in this regard.

(**j**.) Both the lower courts were right in holding that each vessel should have kept its own starboard side of the channel, whatever rules may be thought to have been applicable, or whether any statutory rule was applicable; for this Court repeatedly held, before any port hand or channel rule was adopted, either by the Congress or by the inspectors, that vessels approaching each other in narrow channels, or where their courses diverged as much as one and a half or two points, were bound to keep to port and pass to the right.

Each pilot is bound, with peculiar exceptions not applicable here, to keep well over to the side on his starboard hand, and the fact that the bends in the channel might at times bring one on the starboard of the other, does not affect this rule (The *John S. Hasbrook*, 93 U. S., 405, 407; *Union S. S. Co.* v. *N. Y. & Va. S. S. Co.*, 24 How., 307; *N. Y. & Baltimore Transp. Co.* v. *Phila. & Sav. S. T. Nav. Co.*, 22 How., 461; The *Vanderbilt*, 6 Wall, 225, 229, 230; The *Johnson*, 9 Wall., 146, 149; The *Empire*, 26 U. S. App., 152; *Towboat No. 1*, 74 Fed., 905; The *Luckenbach*, 50 Fed., 129; *Parsons*, 1 Ship & Adm., 569; The *Velocity*, 3 P. C., 44; The *Ranger and the Cologne*, 4 P. C., 519; *Marsden on Collisions* (3d Ed.), 344, 427, 466, 468, 513).

The absence of a channel rule in the code established by R. S., Sec. 4233, caused no great inconvenience, as the general rule of navigation was well settled; but it is worthy of remark that in the rules recently adopted by Congress for *harbors, rivers and inland waters*, which went into operation October 7, 1897, the general custom and practice has been embodied in Article 25, which reads:

"In narrow channels, every steam vessel shall, when it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such vessel."

This is precisely the rule embodied in International Article 21, that the District Judge held was applicable to the vessels.

It may be desirable to call more particular attention to a number of the cases in which the principle now embodied in the statute has been enforced in the decisions of this Court in channel cases as a general rule of navigation.

In The *Johnson*, 9 Wall, 146, the courses of the vessels are indicated in a diagram (p. 149). The propeller *Burden*, with a tow alongside, was proceeding up the East River on the easterly or starboard side, parallel with the shore. Just above the Fulton Ferry, where the bridge now stands

there is a bend which the tug would have turned on a port helm. The steamboat *Scranton*, with a tow on each side, was bound down the river from Corlears Hook, on the New York side, to a point below Fulton Ferry on the Brooklyn side. She was steering diagonally across the river. The vessels were *approaching each other on intersecting lines*, when they sighted each other around the bend near Fulton Ferry.

"The *Scranton*, when about opposite the upper part of Fulton Ferry slip, starboarded her helm, and at a rapid rate swept in on a curve toward the Brooklyn shore, with the purpose of running in under the bow of the propeller and picking up a boat lying on the lower side of the lower pier of Fulton Ferry slip. The propeller seeing the steamer thus coming dangerously toward her, blew one whistle, which is the regulation signal to indicate that she intended to keep to the right, and those on the steamer testified that she blew two whistles, which is the regulation signal that would have indicated that she was going to the left; but the men on the propeller did not hear the two whistles and of course gave no answering signal. The men on the propeller, as it rather seemed, could not at that time have done anything to prevent a collision if they had heard the whistles."

The result was that the steamer ran directly into the canal boat which was lashed to the propeller and did her *and her cargo* serious injury, also injuring herself. Both vessels were libeled for the damage. In the Circuit Court, the *Johnson* was held solely to blame, and this decree was here affirmed. Mr. Justice CLIFFORD, in delivering the opinion, said:

"Prior to the passage of the act of Congress prescribing sailing rules, as well as since that time, steam vessels approaching each other from opposite directions, so as to involve risk of collision, were required to put their helms to port so that each may pass on the port side of the other, and the Court is of the opinion that *that rule is applicable in this case, although the collision occurred before that act of Congress went into operation* (The *Sussex*, 1 W. Rob., 275; The *Niagara*, 3 Blatchf., 37).

Suppose it to be true that these vessels were approaching each other on intersecting lines, so that they would have collided if they had not changed their course, then it is

clear in view of the circumstances that each was bound to port their helm and pass to the right, as there was nothing to prevent them from complying with that well-known rule of navigation. They were navigating in the day time and in good weather, and they had an unobstructed view of what was before them; but the *Johnson*, instead of complying with that rule of navigation, put her helm to starboard for the purpose of crossing to the Brooklyn side and taking another boat in tow, which was lying in the dock just below the lower slip of the Fulton Ferry. Descending the river, as the *Johnson* was, at the rate of seven miles an hour, she obeyed her helm readily, and aided by the reflex tide as she left the stream she came round quickly so as to head towards the shore, and as she advanced on her new course she struck the canal-boat on her port side and caused the injury described in the libel."

In Union S. S. Co. v. *N. Y. & Va. S. S. Co.*, (1855,) 24 Howard, 307, the rule was applied in a case of collision in the channel of Elizabeth River. The steamship *Jamestown*, outward bound, "*intending to take the eastern side of the channel*" (p. 310) "rounded Lambert's Point" buoy near by and set the course at night N. ¼ E. Whilst passing down the channel two lights of an inward bound steamer were seen on the port bow. The helm of the *Jamestown* was ported, "to sheer the steamer still closer to the eastern side of the channel." Soundings which were being taken having shown that the vessel was about to ground on the easterly side, orders were issued to stop and reverse the engines. "Both orders were promptly obeyed, and it was then the master first discovered that the approaching steamer (*Pennsylvania*) had altered her course, and was heading *diagonally across the channel* [to the S. E.] towards the *Jamestown*. They were then less than a quarter of a mile apart, and seeing that a collision was almost inevitable, he instantly directed the alarm bell to be rung and the whistle of the steamer to be sounded" (p. 311). "Among other things, the pilot (of the *Pennsylvania*) admits that *shortly after his steamer passed the lightship, he gave the order to starboard the helm; and what seems even more remarkable, in cases of this description, he acknowledges that he gave the order after he knew that another steamer was approaching*, though he

denies that he had seen her lights" (p. 312). The *Pennsylvania* was held solely to blame.

The opinion of the Court concludes (p. 314):

"But the great fault committed on the occasion was that of putting the helm to starboard instead of keeping the course or porting it when it became known that the other steamer was approaching."

In *N. Y. & Balt. Transp. Co.* v. *Phila. & Savannah Stm. Nav. Co.*, 22 Howard, 461, a steamer ascending the Delaware River about four miles below Marcus Hook, came in collision with a descending propeller with a barge in tow. The propeller claimed she was proceeding down the river on the eastern side of the channel; that the steamer was coming up on the western side, and that the steamer, when about three quarters of a mile distant from the propeller, changed her course more out into the stream of the river, (to the eastward) heading diagonally across the channel and ran with great force and violence against the barge, striking her on the starboard side (p. 469).

(These are substantially the contentions made by the Victory in the present case.)

The Court found (p. 471) that, "At the place where the collision occurred the channel of the river is about three-fourths of a mile wide, and the evidence shows that there is a cove or bend in the river below, so that a vessel coming up the river in the night time would appear to an inattentive or casual observer standing on the deck of a descending vessel, *as being near the western shore, when, in point of fact, she was in mid channel* (p. 471)."

Mr. Justice CLIFFORD (at pp. 472, 473) said:

"On the part of the respondents, this proposition of fact [change of course by the steamer] is denied, and they insist that the fault was committed by the propeller, in omitting to port her helm and go to the right. *Beyond question, the law is well settled that steamers approaching each other from opposite directions are respectively bound to port their helms and pass each other on the larboard side.* * * * After a careful examination of the depositions, we think it is clearly proved that both vessels as they approached each other were near mid-channel. Most of the witnesses on board the steamer ex-

pressly affirm that she was near mid channel when the lights of the propeller were first discovered, and they all agree that her helm was not changed, except for the purpose of bringing the lights of the propeller one point on her larboard bow, until the propeller starboarded her helm and attempted to cross the bows of the steamer. That movement of the propeller was a direct violation of the rules of navigation, and was entirely without any excuse. Her master may have been deceived as to the course of the steamer by the slight bend in the river; but if so, it is the misfortune of those who employed him that he was not better acquainted with the navigation or more attentive to his duty."

In The *St. John* (154 *U. S.*, 586), the tug *Pluto*, with tows, was bound up the Hudson River, keeping to the right-hand or easterly side of the channel. The *St. John*, a passenger steamer, was going down, also keeping to her right or westerly side of the channel. On nearing West Point, the *St. John*, supposing the *Pluto* to be nearer to the western shore than she was, blew two blasts and endeavored to cross over and pass down starboard to starboard and to the eastward of the *Pluto*. Collision having ensued, the *St. John* was held solely to blame, Mr. Justice BRADLEY observing (p. 587):

"The *St. John* selected her own course, instead of *going to the right of the Pluto, as is usual*. She concluded to go to the left, miscalculating the precise position of the *Pluto*, and supposing her to be nearer to the western shoer than she was."

In the *Vanderbilt*, 6 Wallace, 225, it was distinctly held that where the usage in navigating a river is that both the ascending and descending vessels shall keep to the right of the centre of the channel, the omission to comply seasonably with that requirement, if the omission contributes to the collision, is a fault for which the offending vessel and her owners must be responsible; and that *compliance with such a usage is required* in all cases where the course of a vessel is such that if continued there would be danger of collision with other vessels navigating in the opposite direction.

This was a collision between the steamtug *Hubbard*,

which was descending the Hudson River on the western side, and the steamer *Vanderbilt*, going up too near the western side of the channel. The District Court held the *Vanderbilt* solely to blame.

NELSON, *J.*, at Circuit (p. 227), held:

"The point pressing on the steamer is that she was too far to the west (left-hand side) of the channel of the river and *therefore out of her proper course.* * * * The west side is the natural and ordinary track for descending vessels, and the *Vanderbilt* we think was bound to take notice of this fact and to have kept nearer to the middle of the river. She had no right to act upon the idea that the descending boat would take that course and expect her to pass to the left or starboard between her and the west shore."

Mr. Justice CLIFFORD, in delivering the opinion of this Court (at pp. 229, 230), said:

"The usual pathway of steamers ascending the river (Hudson) is on the east [right-hand] side of the centre of the channel, but the *Vanderbilt* came up on the western side in the usual pathway of descending boats and vessels, and the testimony proves that she was moving through the water at nearly double the rate of the steamtug with the tows. * * * Plain inference from the position and character of the blow is that the steamer had ported her helm, and when the collision occurred was steering towards the east side of the shore * * * Steamers approaching each other from opposite directions are *required by the general rules of navigation*, as well as by the recent Act of Congress, to port their helms and pass to the right. * * * Proofs in this case show that the *Vanderbilt* ported her helm, but the change of her course was so late that it insured the collision. * * * The great fault was that she did not change her course and pass to the eastern side of the channel (right-hand side) before entering the fog bank, as all the witnesses agree she might have done without danger or serious inconvenience."

(**k**.) The conclusion from this examination of the authorities would seem to be that the Victory was plainly in fault in that (1), meeting the Plymothian head and head, she did not port and keep to the right, as required by rule

[illegible]; (2) in that, if she was crossing the channel diagonally, and thus obliquely approaching the Plymothian, bound down on the right side of the channel, she did not obey the provision of the Inspectors' 2nd rule by porting and keeping to the right; (3) in that she did not observe the general rule of navigation prevailing for narrow channels by keeping on the starboard side of the channel and passing the Plymothian port to port; (4) in that she disobeyed the proved local custom of the Elizabeth River to keep to the right, a custom with which her master was acquainted, and which the vessel was bound to follow (The *James Bowen*, 52 Fed., 510; The *Vanderbilt*, 6 Wall., 225).

(2.) *The Victory was to blame for attempting to cross the Plymothian's course from the right to the left-hand side of the channel without obtaining a previous agreement by whistle signals.*

On the evidence of her pilot, the Victory, when about half way from Craney Island to buoy 7, blew two blasts on her whistle to the Plymothian, and in less than half a minute thereafter two more blasts, and although she received no assenting reply, starboarded her helm and proceeded on a line diagonally across the channel into the port side of the Plymothian, which she struck at buoy 7, outside of the 25-foot curve on the east bank of the channel and nearly over to the 18-foot curve. The proof is overwhelming that the Plymothian, when *Victory* began her change of course, was close to the easterly side of the channel, steering a straight course down, and both the Courts below have so found.

The Victory's pilot says he did this to cut off some of the distance to Lambert's Point, by heading over for buoy 9, instead of remaining on his own side of the channel (p. 337). It was only an incident that this took him across the bows of the Plymothian.

It is too well settled to require discussion that such a maneuver, without previous agreement of whistles, is the grossest kind of a fault. In the very similar case of the *Johnson* (9 Wall, 146, 155) Mr. Justice CLIFFORD dealt with this subject as follows:

"The signal, even if given before the order to starboard, was nevertheless too late to justify the steamship in attempting to cross the bows of the propeller; but the Court is satisfied that the signal, if given as alleged by the appellant, was not understood by those in charge of the propeller, and that it was culpable rashness, in view of the circumstances, for the steamboat to attempt to cross the bows of the propeller, before receiving any signal that the propeller was willing to co-operate in the proposed change of course. Those on board the steamboat received no answer to their signal, and it is reasonable to suppose that if they were attentive to their duties, they must have known that those in charge of the propeller did not understand their signal, and consequently if they made the proposed change in the course of their steamer, a collision would follow; and if they did not so understand the matter, it was their own fault. Viewed in any light, the propeller was not at fault, and the responsibility must rest on the steamboat. Our conclusion is, that the *Johnson* is liable for the whole damage."

(**3**.) *She was in fault for too great speed in a channel way and for failure to slacken speed or stop and reverse earlier.*

At Craney Island the Victory's high speed was remarked by the lighthouse keeper, his attention being attracted to the boat by the fact that she was going so fast. He judged her speed there was about 12 miles (p. 346). Her full speed is admitted to be 9 to 10 (pp. 47, 131), and her witnesses admit a tide force of two knots (p. 37). But it is claimed her speed was reduced at or about the time of passing the lighthouse to half speed (Gilbert, 61, 75). It is admitted, however, that her speed from there on was five and a half knots *through the water* (p. 48), or seven and a half knots over the ground, and the Court of Appeals found that from Craney Island up her speed through the water was six or seven miles an hour with a two mile tide assisting her (p. 449). This would make her speed over the bottom 8 or 9 miles.

She was 338 feet long, and probably would not be able to stop with the tide behind her inside of four or five times her length (The *Normandie*, 43 Fed., 151, note 159). If she was within this distance from Plymothian when she star-

boarded and blew her last two-blast signal, then she was in fault for not being in better command as to speed before attempting that hazardous manœuver.

If by previous starboarding, she had got herself in such position in the channel that she could not port and keep on her own side, leaving the Plymothian free to proceed down her side, the Victory should have reversed, certainly as early as when her alleged second two-blast signal was blown and not assented to by the Plymothian.

She did not do even this much toward avoiding the collision. Candlish, said that the reversing signal was not given until a minute or so after the second two-blast signal (pp. 51, 56). Captain Elcoate admits that it was half a minute (p. 136), while Pilot Henley, of the Plymothian, says, he immediately reversed on hearing the cross signal, and blew three danger signals, but did not hear Victory blow her danger signals until about a minute after that (pp. 364, 265).

That the Victory blew her danger signals after those of the Plymothian is shown by other and disinterested witnesses. That she could not have reversed as early as the Plymothian did is shown by the result. At the collision, the Plymothian's headway was completely stopped, with buoy 7 under her starboard bow (pp. 211, 232, 240, 239, 193, 355, 374-5, 388, 405, op. 451), and by the force of the blow her head was knocked to starboard, so that the Victory's witnesses admit seeing this buoy come around *in front* of the stem to the port side (pp. 40, 50, 161). This fact and the evidence of disinterested witnesses shows that she was completely stopped and probably receding.

That the Victory had headway on is proved, not only by her pilot's evidence (p. 333) but also by two significant facts: (1.) that she threw the Plymothian's bows around to starboard, so as to bring the buoy from the starboard to the port bows of Plymothian; and (2.) that her bow cut through the Plymothian's three decks and three heavy iron stringer plates, a distance of at least fifteen inches (Quigley, pp. 420-421), damaging her own starboard bow as far back as three feet.

The extraordinary pretension put forward in the Victory's evidence that Plymothian had *sideway* on at the time and fell down across the Victory's bow with her port side, against a tide with a force of two knots, hardly requires discussion.

(**1**.) *The excuses the Victory immediately set up for being on the wrong side of the channel at the time of the collision are an acknowledgment of guilt.*

(**a**.) Her claim that she starboarded because the Plymothian was three points or four on her starboard bow when they were a half or three-quarters of a mile apart, is based on an obvious error.

The Court will observe, by a reference to the chart, Exhibit X, that with Plymothian in mid-channel, where she was located by the Victory's pilot (pp. 331, 342), it would be impossible to place the Victory anywhere in the channel three-quarters of a mile off and heading the channel course so that she could have the Plymothian more than a half point on either bow. On the other hand, with Victory in mid-channel, where she admits she was until she starboarded for schooners, or even on the eastern side, a vessel bearing three points on her starboard bow would be over on the Flats, a long way west of the western channel bank, as shown on our diagram.

The only time at which Plymothian could have been on the Victory's starboard bow was when the Victory was below Craney Island. The course there is about south by east, prior to the westward change which is made at Craney Island (Nelson, p. 339). Even then she could not have had Plymothian on her starboard bow much more than one point.

She was not, however, justified in acting on that bearing, since the Plymothian had a right to assume that when the Victory reached Craney Island she would make the change called for by the bend at that point (The *Velocity*, 3 P. C., 44; The *Ranger and the Cologne*, 4 P. C., 519), as she actually did (Henley, pp. 361, 366). The pilot of the Victory was bound to govern himself by the bearings of the vessels as they were after he had straightened

up the channel course from Craney Island south, and at that time he was on the Plymothian's port bow, and she must have been on his port bow (p. 264).

(**b**) The Victory's claim that she was forced over to the east line of the channel by passing steamers is false.

The master claimed to have met four steamers, and that all of them gave him signals to pass to starboard. The first was a tramp steamer (p. 131), and astern of her were three river steamers (pp. 131, 132).

The proofs failed to support this claim. It turned out that the tramp steamer was three miles ahead of the river steamers (Elcoate, 145), and the Victory's pilot says he does not think the tramp gave any signals (Nelson, 330). The river steamers were small, light-draft vessels, not bound to the narrow limits of the channel. The first of these, it seems, was passed some distance to the north of Craney Island (Candlish, 34, 46; Middleton, 112; Elcoate, 132, 145, 146; Gilbert, 61); the second at or near Craney Island Lighthouse (Candlish, 46; Elcoate, 146), although Gilbert states that the second steamboat also was passed to the north of the lighthouse (p. 68). Candlish says they met the third steamboat a third of the way from Craney Island to buoy 7 (p. 46); Elcoate, a quarter of a mile above the lighthouse (p. 146); Gilbert says just above Craney Island (p. 69); while Middleton says the second was passed opposite the lighthouse, and the third, one length behind the second (Middleton, 102). The pilot, however, admits that the steamboats did not force the steamer out of her course (p. 330); while the captain himself finishes off the story with this evidence (p. 152):

"Q. *Did you have to change your helm for any of those three river steamers?* A. *No, sir.*

"Q. But when you met those river steamers you were so far on the eastern side of the channel? A. *No, sir; we were on the middle of the channel as near as we could get.* They came down the western side."

Moreover, witnesses from two of the three river steamers, the *Luray* and the *Olive*, were examined in behalf of

the Plymothian, and testified positively that they passed the Victory port to port (Harney, 433; Channel, 428). No witness from the other, the *Louise*, was produced to contradict them.

(**c**.) The Victory's statement that a procession of schooners, met with after the steamers passed, kept her from keeping the starboard side of the channel, is also false.

There was no claim in the proofs that the Victory met with more than two schooners between Cranev Island and buoy 7, although it is claimed a third was on their starboard bow at the time of the collision. Mate Candlish indeed intimates there were but two altogether, and that the second was abreast of the Victory at the collision (pp. 57, 58). Both were in mid-channel (pp. 34, 47, 70, 80). The Victory's other navigators agree that the schooners were close behind them at the collision (pp. 58, 147, 66). But, as it is 1,200 yards from the lighthouse to buoy 7, and it is not claimed that the schooners were of enormous size, there was plainly plenty of room for the Victory to have crossed the channel several times between the lighthouse and the buoy. Both of the lower courts so found.

(**d**.) Her claim that she could not have ported at the last moment because of a schooner on her starboard bow was no justification, if true. It was not true. The schooner was at least 100 feet from Plymothian, and Victory could easily have passed between (pp. 280, 364). It is suggested in the Victory's evidence that the Plymothian ought to have starboarded to avoid the collision. If there was room for the Plymothian to starboard without hitting the schooners, there must also have been room for the Victory to port.

(**e**.) Her excuse of an agreement of signals to pass starboard to starboard, which was set up in the pleading (p. 2), utterly failed, even on the evidence of Captain Elcoate, who verified it (pp. 135, 154, 158, 342, 343).

II.

(1.) The faults of the Victory being clear and gross, the burden rests upon her, in order to make a case for apportionment, to establish fault on the part of the Plymothian by clear and convincing proof. In such case the contributing fault must be established beyond a fair doubt.

(2.) Because of the exception of "collision" in all the bills of lading, the cargo rests under the same burden.

(**1.**) *As between the two ships the application of this rule can hardly be contested.* It has been laid down in terms of unmistakable plainness in The *Carroll*, 8 *Wall.*, 302, 306; The *Great Republic*, 23 Wall., 20, 35; The *City of New York*, 147 U. S., 71, 85; The *Oregon*, 158 U. S., 186, 197; The *Delaware*, 161 U. S., 459, 470; and in the decisions of the lower courts: The *Luckenbach*, 8 U. S. App., 9; The *Mexico*, 78 Fed., 653, 655, 656; The *E. A. Packer*, 49 Fed., 92, 96; The *Athabasca*, 45 Fed., 651, 655; The *Manistee*, 7 Biss., 37.

In The *Umbria*, 166 U. S., 404, 409, Mr. Justice BROWN reaffirmed the principle:

"Indeed, so gross was the fault of the *Umbria* in this connection that we should unhesitatingly apply the rule laid down in The *City of New York*, 147 U. S., 72, 85, and The *Ludvig Holberg*, 157 U. S., 60, 71, *that any doubts regarding the management of the other vessel, or the contribution of her faults, if any*, to the collision, should be resolved in her favor."

(**2.**) *By reason of the exception of "collision" in all the bills of lading, the same rule should be applied as against the cargo.*

Omitting from consideration here the effect of the "negligence" and "flag clauses," we find an exception in all the bills of lading of "collision" *eo nomine*, and of

damage arising from "perils of the sea and dangers of navigation" (pp. 487, 490, 495).

Even if there was no exception of collision in the bills of lading, damage to the cargo from sea water entering through a hole in the side of the ship, made by collision, would be *prima facie* a loss within the exception of perils of the seas, and in such case, without proof of negligence on the part of the shipowner, the libelants could not recover (The *Xantho*, 12 App. Cases, 503); but the express exemption of "collision" makes the matter more clear. It changes the liability of the Plymothian to her cargo from that of a common carrier to that of a bailee.

In *New Jersey Steam Nav. Co.* v. *Merchants Bank*, 6 How., 344, 382, there was an exception "not responsible for the loss of any goods, wares, merchandise, money, &c." A sum of money was lost in transit, NELSON, *J.* (p. 382), said:

"The owner by entering into the contract, virtually agrees, that in respect to the particular transaction, the carrier is not to be regarded as in the exercise of his public employment; but as a private person, who incurs no responsibility beyond that of an ordinary bailee for hire, and answerable only for misconduct or negligence."

As soon as the carrier shows the damage is within an exception in the bill of lading, the burden of proof shifts, and the shipper, to defeat the operation of the exception must prove want of skill or diligence (*Transportation Co.* v. *Downer*, 11 Wall, 129; *Ry. Co.* v. *Reeves*, 10 Wall, 176; *Clarke* v. *Barnwell*, 12 How., 272, 280; *Wertheimer* v. *Penn. Ry.*, 17 Blatchf., 421; The *Neptune*, 9 Blatchf., 193; The *Glendarroch*, 1894 Prob., 226; The *Hindoostan*, 67 Fed., 794 (C. C. A.); The *New Orleans*, 26 Fed. Rep., 44; The *Norway*, *B. & L.*, 404, 407, 408; *Phillips* v. *Clark*, 2 C. B., N. S., 156; *Wild* v. *Pickford*, 8 M. & W., 443, 459; *Zeech* v. *General Steam Navigation Co.*, L. R., 3 C. P., 14; *Craig* v. *De Largy*, 16 Scotch L. R., 750; *Dobbie* v. *Williams*, 21 Scotch L. R., 667; The *R. D. Bibber*, 8 U. S. App., 42; The *Cleveland*, Newb., 221; *Union Ins. Co.* v. *Shaw*, 2 Dillion, 23; *Casks of Sherry Wine*, 7 Benedict, 509; *Dedekam* v. *Vose*, 3

Blatchf., 44, 77; The *David and Caroline*, 5 Blatchf., 266).

And unless it is shown by the shipper that the loss might have been prevented by the use of due care, the damage is presumed to have occurred without negligence (The *Live Yankee*, Deady, 422, The *R. D. Bibber*, 8 U. S. App., 42).

Transportation Co. v. *Downer*, 11 Wall., 129, was an action brought to recover damages for the loss of 84 bags of coffee shipped upon the propeller *Buffalo* at the City of New York, to be transported to Chicago. They were damaged by water, owing to a stranding on the voyage.

The bill of lading exempted the company from liability for loss occasioned by *dangers of navigation on the lakes and rivers.*

The defense was, that the loss of the coffee came within this exception. The plaintiff showed that the defendant had the coffee for transportation, and that it was damaged and spoiled while in its possession. The defendant then showed that the loss was occasioned in the manner above stated; that is, by one of the dangers of lake navigation. The plaintiff then endeavored to prove that this danger, and the consequent loss, might have been avoided by the exercise of proper care and skill.

The defendant moved the Court to instruct the jury as follows:

"If the jury believed, from the evidence, that the loss of the coffee in controversy was within one of the exceptions contained in the bill of lading offered in evidence, that is to say, if it was occasioned by perils of navigation of the lakes and rivers, *then the burden of showing that this loss might have been avoided by the exercise of proper care and skill is upon the plaintiff; then it is for him to show that the loss was the result of negligence.*"

The Court refused to give those instructions, and on the prayer of the plaintiff, instructed the jury as follows:

"The bill of lading in this case excepts the defendant from liability, when the property is not insured from perils of navigation. It is incumbent upon the defendant to prove itself within the exception, *and it is the duty of the defendant to show that it has not been guilty of negligence.*" *Held*, error.

Mr. Justice FIELD, in delivering the opinion of the Court, said:

"On the trial, the plaintiff made out a *prima facie* case by producing the bill of lading, showing the receipt of the coffee by the company at New York, and the contract for its transportation to Chicago, and by proving the arrival of the coffee at the latter place in the propeller *Brooklyn*, in a ruined condition, and the consequent damages sustained. The company met this *prima facie* case by showing that the loss was occasioned by one of the dangers of lake navigation. These terms, *dangers of lake navigation*, include all the ordinary perils which attend navigation on the lakes, and, among others, that which arises from shallowness of the waters at the entrance of harbors formed from them. The plaintiff then introduced testimony to show that this danger, and the consequent loss, might have been avoided by the exercise of proper care and skill on the part of the defendant. If the danger might have been thus avoided, it is plain that the loss should be attributed to the negligence and inattention of the company, and it should be held liable, notwithstanding the exception in the bill of lading. *The burden of establishing such negligence and inattention rested with the plaintiff, but the Court refused an instruction to the jury to that effect, prayed by the defendant, and instructed them that it was the duty of the defendant to show that it had not been guilty of negligence. In this respect the Court erred.* In *Clark* v. *Barnwell*, 13 *How.*, 272, the precise point was involved, and the decision of the Court in that case is decisive of the question in this. And that decision rests on principle.

"A peril of navigation having been shown to exist, and to have occasioned the loss which is the subject of complaint, the defendant was *prima facie* relieved from liability, for the loss was thus brought within the exceptions of the bill of lading. *There was no presumption, from the simple fact of a loss occurring in this way that there was any negligence on the part of the company.* * * * The grounding of the propeller, and the consequent loss of the coffee, may have been consistent with the highest care and skill of the master, or it may have resulted from his negligence or inattention *The accident itself, irrespective of the circumstances, furnished no ground for any presumption one way or the other.* If, therefore, the establishment of the negligence of the defendant was material to the recovery, the burden of proof rested upon the plaintiff."

In *Railroad Co.* against *Reeves*, 10 Wall., 176, Mr. Justice MILLER, in dealing with this point, said:

"Now, when it is shown that the damage resulted from this (an excepted cause) immediately he is excused. *What is to make him liable after this?* *No question of his negligence arises unless it is made by the other party. It is not necessary for him to prove that the cause was such as released him, and then to prove affirmatively that he did not contribute to it.* If, after he has excused himself by showing the presence of the overpowering cause, it is charged that his negligence contributed to the loss, the proof of this must come from those who assert or rely on it."

And in *Clark* v. *Barnwell*, 12 How., 272, the rule is stated (p. 280) to be:

"Although the loss occurs by the peril of the sea, yet if it might have been avoided by skill and diligence at the time, the carrier is liable. But in this stage and posture of the case the burden is upon the plaintiff to establish the negligence, as the affirmative lies upon him. * * * If, on the whole, it be left in doubt what the cause of the injury was, or if it may as well be attributed to perils of of the sea (or other excepted causes) as to negligence, the plaintiff cannot recover."

The rule to be deduced from these cases would seem to be that no damages for loss of cargo could be awarded against the Plymothian, except upon affirmative proof by the cargo underwriters of negligence on her part, such as would justify a decree against her if sued alone; and heretofore no distinction has ever been made in grades of negligence to be proved in cases where her own cargo has been libelant from cases where another ship or its cargo has been libelant. As was said by this Court in The *City of Hartford and the Unit*, 97 U. S., 323, 325: "Freedom from fault is a good defense in a cause of collision, even when the suit is promoted to recover compensation for injuries received by an unoffending party."

The Court of Appeals, as we submit, lost sight of the fact that the exception of "collision" in the bills of lading changed the aspect of the cargo's case against the Plymothian. It appears to assume that the relation between

the Plymothian and her cargo remained that of common carrier instead of bailor and bailee. For example, the opinion (p. 502) says:

"We are of the opinion that the Court below did not err in the conclusion as to the error committed by the Victory, but, *in considering the right of the owners of the cargo to damages*, we cannot reach the same conclusion which he did, exempting the Plymothian from all responsibility."

Again (p. 503):

"It certainly would not be equitable to allow her [Plymothian] to go in and share on equal terms in the fund in this Court with the cargo, which certainly was in no fault whatever. *The rights of the cargo owners differ entirely from those of the two steamships. They in no way share in the faults committed; they are entitled to complete indemnity, restitutio ad integram (citing* The *Atlas*, 93 U. S., 302; The *Alabama and the Gamecock*, 92 U. S., 695; The *Virginia Ehrman and the Agnes*, 97 U. S., 316). In this instance before the Court the cargo must be paid for in full by both vessels."

At the conclusion of the opinion (p. 504) the Plymothian is required to make up a deficiency, "so that the cargo owners obtain complete indemnity."

It is evident from these passages that the Court felt it would be a hardship if the underwriters on Plymothian's cargo should have to bear a portion of their own loss because an act of Congress, in establishing a limitation of liability for the owners of the Victory, had incidentally cut off a portion of the recovery as against that vessel.

The surplus of the cargo damages not recovered from the owners of the Victory, the Court said should be imposed on the owners of the Plymothian. In doing this the Court took no account of Plymothian's plight under the same statutes. The Congress, by those acts, also took away a part of her right to recover damages for her own losses from the wrong doing Victory. In the result, therefore, Congress has imposed one class of losses on her and the Court of Appeals has saddled her with another class, notwithstanding that both classes would have been payable

in full by the Victory if the statutes of Congress had not interfered.

It is to be inferred from the opinion that if the cargo underwriters had not been in the case, but the controversy stood simply between the vessels, no fault would have been found against the Plymothian. The denial of any recovery in behalf of the Victory against the Plymothian leads to this conclusion. But, as under the exception of "collision," there could be no recovery against the Plymothian by the cargo, except upon proof of negligence, and as negligence was not found against her, as appears from the above finding, it seems that the Court did not give due weight to the effect of the collision exemption. The cases cited by the Court in support of its conclusion were not between ship and her cargo, with an exemption of "collision," and hence were not strictly in point.

They certainly are not authority for the proposition that in the present case "the rights of the cargo owners differ entirely from those of the two steamships."

In view of this exemption the case stands precisely as though the damaged cargo had been on board the Victory instead of on board the Plymothian. But in such cases this Court has held at least twice (The *Johnson*, 9 Wal., 146, 150; The *Ludvig Holberg*, 157 U. S., 60) that without such proof as would entitle the opposing vessel to a recovery, nothing could be awarded on account of her cargo.

In the *Johnson* case the cargo was in a canal boat of that name, in tow alongside of a propeller tug, and was damaged. The canal boat owner was promovent in the suit.

In the *Ludvig Holberg* the statement of the case, page 61, says, that "*the suit was promoted by the owner of the cargo of the bark*" which was struck by the steamer. The situation of the cargo was treated throughout the opinion as being precisely the same as that of the vessel in which it was carried, and although that cargo, like the cargo on the Plymothian, "certainly was in no fault whatever" (opinion, p. 563), the Court, on a finding that the tug was grievously in fault, laid down the same rule as

respects recovery by cargo bound to prove negligence, that it had often laid down as against a ship bound to prove negligence.

Mr. Justice BROWN, in delivering the opinion (at p. 70), said:

"This is one of those cases where a clear fault has been found on the part of one of the vessels, both by the District and Circuit Courts, and the findings of fact are such as to render it incumbent upon us to affirm their decree. As we said in The *City of New York*, 147 U. S., 72, 85, 'where fault on the part of one vessel is established by uncontradicted testimony, and such fault is of itself sufficient to account for the disaster, it is not enough for such vessel to raise a doubt with regard to the management of the other vessel. There is some presumption at least adverse to its claim, and any reasonable doubt with regard to the propriety of the conduct of such other vessel should be resolved in its favor.'"

So here the cargo underwriters, having the burden of proof under the exception, are bound to make out some negligence on all the elements of the case against the Plymothian. It is not enough that they raise some doubt whether she might not have taken some step not taken which would have avoided the collision. It is for them to make out that she did not take some step, or make some maneuver, which by law she was bound to make (*Williamson* v. *Barrett*, 13 How., 101, 109), and certainly with that burden upon them they must, at the least, be able to point out some clear fault established by incontrovertible proofs.

The fact that under the Limitation of Liability Acts the cargo is deprived of its right to recover a part of its damages from the Victory, which ought to pay them, must be immaterial in considering the fault of the Plymothian. Obviously, it was not the intention of Congress that a portion of the damages which but for the statutes would be recoverable from one vessel should be imposed by the Court upon another if they would not have been so imposed in the absence of the statutes. The primary object was to leave the loss over and above the value of the wrongdoing vessel for limitation purposes where it might fall, unless, indeed, both were in such

fault that the cargo underwriters could have recovered the whole loss in a suit against either vessel alone (The *Ludvig Holberg*, 157 U. S., 60).

III.

Plymothian was not in fault for failing to stop and reverse earlier.

The important matters in this connection are—

(1.) The Plymothian's course and speed.

(2.) The position and course of Victory when her first two-blast signal was blown.

(3.) Whether that course was such as to involve risk of collision at or about that time, so Plymothian would have been bound to stop or reverse at once; or

(4) Whether there was room and time for Victory to correct her error, and whether Plymothian could have presumed she would do so, and hence was justified in sounding a single blast after perceiving Victory's change of heading and calling for a reply before she was required to stop and reverse; and

(5) Whether she was stopped at the collision.

1. *The Plymothian's course and speed are not involved in much doubt.*

She rounded buoy 9 less than a length off (*Henley*, 360; *Mardon*, 263; *Wood*, 238; *Lyons*, 209; *Schroder*, 202; *Hendema*, 220; *Baird*, 231; *Etheridge*, 353; *Goodwin*, 373; *J. I. Clarke*, 389; *Harrison*, 395; *J. M. Clark*, 401; *Channel*, 431).

All agree that on passing the buoy she straightened right down the channel course on the easterly side (Henley,

365, 367, 369; Mardon, 268, 273, 280; Ham, 184; Lyons, 209; Wood, 238; Baird, 231; Schroder, 203; Etheridge, 353, 354; Goodwin, 373; J. M. Clark, 402; Harrison, 395; Channel, 429; Pebworth, 424; Wynne, 404). The District Judge did not consider these primary facts in any doubt (pp. 449, 450), nor did the Court of Appeals (p. 499).

The only change either side claims she made, after straightening down the channel, was by a port helm, which put her closer to the easterly edge of the channel at collision.

She left her pier at 4 o'clock P. M., under half speed until buoy No. 9, 350 yards from the pier, was close under the starboard bow, when the engines were put full speed ahead (pp. 263, 360, 282). This was at 4.05 P. M. (p. 282). It is 767 yards from there to the collision (*vid.* Exhibit X). The tide was strong flood running with the force of two knots (pp. 37, 360, 361).

The engines were going at full speed only about 5 minutes. At 4.10 the reverse order was rung, and at about 4.14 the ship's struck (pp. 283, 163).

Plymothian's full speed was seven knots (p. 273). Starting at half speed against the tide, and having her engines at full speed against it only five minutes, it seems plain she could not have attained much speed before reversing.

On all the probabilities, and on the conflicting testimony, the District Judge found her speed over the ground was about 4 miles an hour (p 449). The Court of Appeals adopted this finding (p. 499).

2. *The Victory's position when she sounded her first two-blast signal is involved in a conflict of testimony, but, on the clear weight of the evidence, she was then to the north of Craney Island.*

This has already been discussed in part under Point I. (*ante*, p. 19).

It is clear that Victory blew two double-blast signals and a three-blast signal before the collision. No claim is made that she blew any more. Her crew's evidence is that the two-blast signals were within a half minute or a minute of each other when the steamer was half way be-

tween Craney Island and buoy 7, and that the three blasts followed a minute or so later.

Plymothian heard only one two-blast signal and the three blasts at that time. The evidence of the disinterested witnesses of both sides corroborates the Plymothian as to the signals then blown. None of them heard two double blasts, and a three-blast signal from Victory *in short succession.* All who saw or heard the first two blasts from Victory say the first signal was blown a good deal earlier and *when Victory was to the north of or about Craney Island.*

The evidence on this subject will be examined in detail.

(**a.**) In one of the Victory's answers it was alleged that she blew this signal when about 550 or 600 yards north of buoy No. 7 (p. 437). In her petition for limitation of liability (pp. 1, 2) she claims to have blown it "*soon after passing* Craney Island Light," and places the Plymothian at that time as "apparently starting down the river from opposite Lambert's Point," and the same statement is made in her answer to the Plymothian's petition (p. 319).

Nelson, pilot of the Victory, says that he blew the first two whistles to the Plymothian about half way between Craney Island Light and buoy 7 (p. 330).

Captain Elcoate says that in reply to that signal he saw steam from the Plymothian, "and about fifteen seconds after I saw steam I heard a faint sound," which he took to be the Plymothian's whistle (p. 134). Thereupon, and about a half a minute after they blew their first two, they blew two more blasts (p. 135). To the second blast he says he received no reply.

Gilbert, second officer, says: "We blew two whistles and then repeated them" (p. 64).

"Q. Was there much time elapsed between the Victory sounding her two first blasts and sounding her second two? A. No, not much time.

Q. A short time? A. Yes, sir.

Q. What interval of time was there between your first and second blasts? I mean your second set of blasts? A. Half a minute, as near as I can say. It may be more, and it may be less" (p. 72).

This witness also admits having seen steam coming from the Plymothian's pipe between the time the Victory blew her two blasts, although he heard no sound (p. 64).

Pilot Nelson claims that the second two blasts were blown about a minute after the first two (p. 330).

(**b**.) It is apparent from this testimony, if true, that the Victory blew two blasts twice close together. The Plymothian's evidence shows that she heard but one of them. But whether it was the first or the second (if two were then blown) cannot be definitely ascertained from the evidence. If the Victory blew two blasts twice with a short interval between, as she claims, it seems obvious that one of them overlapped a whistle from the Plymothian. Her first two blasts may have overlapped the Plymothian's one blast, or her last two may have been overlapped by the Plymothian's danger signals.

(**c**.) It is most significant that, while a number of disinterested witnesses in the case, some called by the *Plymothian*, prove that the *Victory* did blow a two-blast signal twice, none called on either side corroborates the *Victory's* story that the two double blasts were blown so close together, and were followed by a signal of three blasts.

J. I. Clark, captain of the tug *Mary and Joe*, who was standing on Lambert's Point pier (p. 388), says that the Plymothian blew one blast just after passing buoy No. 9, that the Victory answered it with two (p. 388), which he heard (390), the Victory at the time she blew hers being "about at Craney Island Light" (pp. 392, 393). The vessels were then a good mile apart. Later, he says the Plymothian blew another one whistle; he heard the Victory reply with two, to which the Plymothian at once answered with three, followed a little later by three from the Victory (p. 390). He says the Victory was a mile off when she blew her first two (p. 392). He saw the steam of the whistle (p. 393).

J. M. Clark, captain of the tug *Pioneer* (p. 400) says that the Plymothian when about a hundred yards below buoy 9 blew one blast on her whistle, to which the Vic-

tory answered with two. "I could see the whistle from the pilot house" (p. 400). He then went out of the pilot house and walked aft to the engine-room, spoke to the engineer, who came out, and both were standing on the stern of the boat when the Plymothian blew again, her whistle being answered by two from the Victory (p. 401). He also says the *Victory* was in the neighborhood of Craney Island Light at the first cross-signal (p. 401).

Goodwin, captain of the tug *Commodore* (p. 372) says that when the Plymothian was at buoy No. 9 (p. 373) the *Victory* was very little to the south of Craney Island (p. 378); that the Plymothian blew one whistle just as she rounded buoy No. 9 (p. 373). He saw the steam of two whistles in reply from the Victory, but did not hear them (pp. 374, 383). The Plymothian blew again a little while later, the Victory replied with two, which he heard (p. 374). He says the Victory was about a hundred yards south of Craney Island when the first whistles were exchanged (p. 383). He says also that only a few seconds elapsed between Victory's two signals (p. 379) but as he did not hear her danger signal (p. 379), it seems probable that this was what he heard soon after the first signal that he saw.

Etheridge, mate of the Commodore, heard the Victory blow a single blast, to which he heard no reply, afterwards heard her blow again, and heard a two-blast signal in reply. The Plymothian then blew three, and reversed (pp. 353, 355).

Wigham, a witness for the Victory, who was stationed on the *Princess*, at anchor opposite Lambert's Point, says he heard two blasts from the Victory repeated, but heard no other signals from her (p. 23). What he took for the repetition of the two-blast signal was probably the Victory's three-blast danger signal. It seems probable that he did not hear her first two blasts.

Swain, also for the Victory, a witness from the barge *Storm King*, at anchor off Lambert's Point, only heard one signal of two blasts from Craney Island way (p. 393).

Pratt, captain of the tug *Wanderer*, a witness for the Victory, was out on the western side of the channel,

watching and waiting for the Victory with her mail. He only heard her two blasts once (p. 306).

It is remarkable that these witnesses, all of whom were in the near neighborhood of the Plymothian should have failed to hear a two-blast signal from the Victory repeated and followed by three blasts from her, if they were blown close together as alleged. The evidence of those who heard two double blast signals from the Victory shows that a considerable interval elapsed between the two. The fact that others did not hear two at all, but heard only one two-blast signal shortly before the collision, is most persuasive evidence that she did not blow two others at or about that time; but if she did it seems that one of them must have been overlapped by whistles from the Plymothian. The evidence of all these witnesses accords with that from the Plymothian that only one signal of two blasts, and the signal of three blasts could be heard by witnesses in her neighborhood at the time the Victory claims she repeated a two-blast signal and followed it up with three.

(**d.**) In addition to the evidence of J. I. Clark (pp. 392, 393), of J. M. Clark (p. 401), of Goodwin (pp. 374, 383), that the Victory's first two blasts were blown when she was near Craney Island Light, we have the evidence of Captain Wynne, on the tug *Lumberman*, who was coming out of Tanner's Creek, about half a mile to the eastward of Craney Island, whose position was nearly abreast the Victory as she was coming up the channel to the northward of Craney Island Light (p. 404). He was in the best position to locate her in the channel when she blew this first signal. He saw the Plymothian leave her dock, and saw that the Victory was then below Craney Island (p. 404). When the Plymothian was in the channel, about three or four hundred yards from the pier (pp. 404, 407), he noticed that she blew one blast, and that two or three minutes later the Victory blew two (p. 404). When the Victory blew this first signal of two blasts he says she was still *below the lighthouse* (p. 409).

(e.) We also have the evidence from the Victory herself, Candlish (p. 34); Elcoate (p. 132), that she did blow two whistles just below Craney Island. They claim, however, that these whistles were blown as passing signals to river steamers; but witnesses from two of the river steamers were produced, who proved that they passed the Victory port to port, instead of starboard to starboard; and the District Court so found. Hence, as she could not have blown the two-blast signals for these river boats. A fair conclusion from the evidence seems to be that her first two-blast signal was blown when she was below or near Craney Island lighthouse, and that she did not blow a repeated signal of two blasts at the time she says she did.

(f.) The time when the Victory's first whistles were blown, is definitely fixed by circumstances mentioned by both pilots, which effectually contradict Nelson's statement that he blew it half way between Craney Island and the buoy. Nelson testified (p. 340):

"Q. You saw this steam from the whistle between the time you blew your first set of whistles and the time you blew your second set of whistles? * * * A. Yes, sir.

"Q. And they were about two minutes apart? A. Hardly that, not more than two.

"Q. Between your two signals? A. Yes, sir.

"Q. When did you first observe her, as you say, port her helm? A. *She straightened down a few minutes* and then ported her helm just below the Merrimac (No. 22), buoy. *I blew two whistles before he straightened down.*

"Q. *You blew two whistle before he straightened down?*

A. *Just about the time he straightened down, I should have said.*"

He also testified to Plymothian's position when she straightened down the channel (p. 342):

"Q. You noticed when she came out [from the pier] and got about mid-channel, she hung in mid-channel some time, and then she went to the eastern side? A. Yes, sir.

"Q. You don't desire to correct that in any way? A. No, sir.

"Q. And as for the period she was hanging in mid-channel, it may have been a minute or two? A. Going down, sir.

"Q. Hanging down the mid-channel? A. Yes, sir.
"Q. And that was about one or two minutes? A. Yes, sir; I suppose so."

Thus we have Nelson's own statement that he blew his first signal *before* Plymothian straightened down opposite Lambert's Point; and the evidence demonstrates that Victory was then to the north of Craney Island.

Pilot Henley also shows that at the time he was straightening down the channel by buoy 9 the Victory had not made the turn to westward called for by the conformation of the channel at Craney Island (Nelson, p. 339 and chart).

He says (pp. 360, 361):

"Just as I passed the buoy and straightened up for the channel, I sung out "Steady," and I saw this Victory coming up just ahead a little on the port bow, and I blew one whistle just as I passed this black buoy, and after blowing the whistle, after one minute, I could get no response, I blew another one whistle. I got no response, but he ported his helm, so that I could see the whole port side of his ship and the round of his stern, and I went along a few minutes."

He testifies as to the position of the Victory at the time Plymothian passed buoy 9 (p. 365):

"Q. You say when you passed from Lambert's Point, you passed close to No. 9 buoy? A. Yes, sir. * * *
"Q. The buoy was then to the east of you at that time? At that moment where was the Victory? A. Coming up somewhere just *below* Craney Island Light.
"Q. She had passed Craney Island Light? A. No, sir.
"Q. Hadn't passed Craney Island Light? A. No, sir."

It is thus determined with reasonable certainty, on the evidence of the two pilots, that the Victory's first two-blast signal was blown before she passed Craney Island. Not only were the vessels so far apart at that

time that the Plymothian would not have been bound to stop if she had heard a signal, but as there were at least two river steamboats between the vessels at that time, her pilot might well have supposed that the Victory's two blasts, if blown, were intended for one of them, rather than for him.

(g.) However the Court may view this conflict of proofs if it finds the first two blasts were blown when the Victory was below Craney Island, a mile and an eighth away, it was certainly no fault on the part of the Plymothian contributing to the collision that she failed to hear that signal, which was not then, nor for some time afterwards, followed by any change of course; while, if it finds the two-blast signal was repeated within a half minute, it seems a fair conclusion, from the testimony, that one of them was overlapped by the whistle of the Plymothian. As Plymothian acted immediately and effectively on hearing the one she did hear, and succeeded after that in stopping her headway, it was not really material that she did not hear the other.

The cargo underwriters, therefore, must point out some risk of collision after the Victory passed Craney Island, which determined the duty of the Plymothian to take precautions to avoid a collision. But such risk first appeared when the Victory starboarded as testified to by the Plymothian's witnesses, and immediately on perceiving that, she took the required precautions, and thereby absolved herself from all blame.

3. *The Victory's course was along mid-channel or to the west of it and was not such as to involve risk of collision until she made a change to port as under a starboard helm, just before sounding the two-blast signal that Plymothian heard.*

On this point the District Judge made no express finding. He says the Victory "moved after or from the time of Craney Island light on or to the eastern side of the channel under a starboard helm" (p. 449). The Court of Appeals' opinion implies that there was no change by Vic-

tory, but a gradual straignt approach to the point of collision. "Victory was seen * * * opposite to Craney Island light, a mile and an eighth off, under a starboard helm; she was about mid channel, or perhaps to the eastward of mid-channel. * * * They kept their respective courses *without change* until the collision became imminent, indeed inevitable, when each reversed," &c. (p. 499).

We submit that this finding is against the clear weight of the evidence; that no witness except Victory's crew says she was under a starboard helm at Craney Island; that if she had been, and had kept her course "without change" she would have been ashore at least a quarter of a mile northward of the place of collision; that in fact she ported her helm at Craney Island, heading up S. ½ W., which would not take her to the place of collision, and that she got there by starboarding when only three or four lengths away.

(**a.**) The testimony of the Plymothian's officers and crew was unanimous that the Victory was on their port bow all the way up from below Craney Island to the point where she changed her course to port just before blowing a two-blast signal.

Lyons, wheelman, who was on the lower bridge with the compass before him, says that at the time she blew her two blasts she was about a half or three-quarters of a point on the port bow (p. 210).

Wood, second officer, who was on the after deck just by the No. 4 hatch when he first saw the Victory, just after the Plymothian passed buoy 9, says, "She was on my port side. I saw her over my port side" (p. 239).

Hendema, socond wheelman of the Plymothian, says that at the time the Plymothian's alarm whistles were sounded and her helm ordered hard-a-port, the Victory was about a point or a point and a quarter on their port bow (p. 221).

Baird, A. B., who was on the after hatch coiling down rope (p. 230), says that he heard three single blasts from his own vessel, and afterwards a danger signal of three blasts, and that just after he heard the single whistles

he looked forward and saw the Victory a shade on the Plymothian's port bow (pp. 231, 236).

Schroder, steward, who was in the neighborhood of the No. 3 hatch (p. 202), and passing from one side to the other (p. 203), says that after hearing three whistles on his vessel he looked forward, and that the Victory at that time seemed to be about ahead, "throwing over on the same side we were on" (p. 203). This necessarily implies that she was coming from the other side.

Captain Mardon testifies that after he had rounded buoy 9 and steadied the helm down the channel the Victory was somewhere about Craney Island and on his port bow. He also says that his ship must have been bearing on their port bow (p. 264). "She was coming up, as near as I can say, about mid-channel, with our port sides open on each other—a little on our port bow. * * * That's the situation of the two ships after we rounded No. 9 buoy. The Victory was a little on our port bow all the time. * * * I don't know exactly how many points she was. I could see the side. We didn't take the bearing by the compass in that case. A seaman can see a ship, whether he is going to clear her or not. * * * She was on the port bow all the time. * * * She was coming up about the same until we heard her two whistles and saw her starboard her helm."

(P. 270.) "Q. She was coming up mid-channel then all the time until you got the two whistles? A. Yes, sir.

Q. And at that time she starboarded? A. Yes, sir, and went across the channel.

Q. And those two whistles were given after you sounded the third whistle? A. After we sounded the third of our single blasts. As soon as the two whistles were blown we sounded our danger signal and put our ship full speed astern" (p. 271).

Pilot Henley says: "Just as I passed the buoy" (No. 9), "and straightened up for the channel, I sung out 'steady,' and I saw this Victory coming up just ahead a little on the port bow; and I blew one whistle just as I passed this black buoy, and after blowing the whistle, after one minute, I could get no response, I blew another one whistle. I got no response, but he ported his helm, so

that I could see the whole port side of his ship and the round of his stern,* and I went on a few minutes. All at once the captain said: 'Pilot, what is that fellow doing?' And I blew one whistle again, and he answered with two, and I immediately blew the danger signals and reversed the ship full speed. * * *

Q. What should you think he did with his helm when he gave you the two whistles? A. Starboarded his helm and came right into us. He was on my port bow, with his port bow showing to me, and when he starboarded his helm was the time I blew my whistle, and he blew two whistles, and I gave the danger signals immediately, and reversed the ship (pp. 360, 361).

Q. How long did you proceed *before* you blew your third signal whistle? A. As I said, when I blew that (second) he gave me no response, but ported his helm and showed me the whole port side of the ship, leading me to suppose he understood.

Q. You blew the second signal and got no response, and then saw he was altering his course? A. He ported.

Q. He in the meantime had ported and was showing you the round of his stern*? A. Yes, sir.

Q. And you were approaching port to port and all was clear? A. Yes, sir; all was perfectly clear.

Q. Then it was you saw him alter his course? A. About three minutes after that.

Q. And then you blew your third whistle? A. And got a cross signal from him.

Q. When he was altering his course then how was he coming? A. He starboarded a little for me, *but didn't come up straight for me*, and as I saw him altering his

* It seems apparent that the Victory at this time was making the bend to westward in the channel required by the red buoy just to the north of Craney Island (Nelson, p. 339). The change of course of the channel there is about one and a half points. In straightening up the channel, the Victory evidently must have headed well to the westerly side, in order to show "the whole port side of his ship and the round of his stern" to Pilot Henley. Her witnesses admit they were steering straight up the channel after passing Craney Island, heading S. ¼ W. (pp. 332, 335). This carries with it a necessary admission that their helm was ported at Craney Island (the channel course below being S. by E. *vid* chart), and that the vessels on a heading by Victory of S. ¼ W. must have been port to port.

course I blew him a signal, and he blew two whistles, and I blew the danger signal and reversed the ship" (p. 363).

He judges the Victory was from seven to nine hundred feet away when she starboarded and blew the danger signals (p. 361).

Prior to the starboarding, just before the two blasts were blown, the Victory, he says, was about mid-channel, and had been there all the way up from lighthouse (pp. 366, 367, 368).

(**b.**) The foregoing evidence is strongly corroborated by the disinterested witnesses.

At or about Craney Island the Victory was clearly not further east than mid-channel, and was probably close to the westerly edge. Both pilots place her at mid-channel (Nelson, pp. 335, 336; Henley, p. 366).

Captain Mardon, in his answer to the first libel, filed Dec. 3, 1891, placed the Victory at the same point (p. 443). But witnesses who were themselves on the westerly side of the channel, or closer to the Victory, say she was nearer the westerly bank.

Brown, the Craney Island lighthouse keeper, says that she passed close to the west bank. "She came as close up to the lighthouse as she could to keep afloat, and I thought too close" (p. 346; also pp. 348, 349).

Harnay, captain of the steamboat *Luray*, says he passed the Victory just after passing Craney Island.

"Q. And how did you pass the Victory? A. I presume she was about in the middle of the channel, might have been a little on the starboard side. By my leaving her on the port, I judged she must have been just a little might on the starboard side of the channel coming up.

Q. On *her* starboard side of the channel? A Yes, sir (p. 423).

Etheridge, mate of the *Commodore*, says:

"I just saw the Victory coming up the river, and we went out to meet her in order to get a tow. * * *

Q. What speed was she making? A. I suppose at the least calculation eight or ten miles an hour.

Q. What part of the channel was she moving in? A.

As near midship channel as she could get. I mean the middle of the river" (p. 354).

Goodwin, captain of the same tug, says:

"Q. How was he [Victory] in respect to the channel when he passed Craney Island? Was he on the middle, or on the east, or west? A. He was on the west side.

Q. When he blew the first time the blasts, you did not hear" (saw steam); "how was it? A. On the west side.

Q. How was he when he blew the second blasts of two whistles? A. Coming up then, about middle way.

Q. Directing his course to port under a starboad helm? A. Yes, sir.

Q. Then he kept straight ahead to the scene of the collision at buoy 7? A. Yes, sir.

Q That is on the eastern edge of the ship channel? A. Yes, sir" (p. 355).

Harrison, engineer of the *Pioneer*, who was called out of the engine-room by his captain at the time the last cross signals were blown (p. 394), says:

"Q. When you looked at the Victory then, was she to the east or to the west of the Plymothian? A. To the west; coming up on the west bow of the Plymothian. * * *

Q. Did you see the Victory over the right hand side of the Plymothian, or the left hand side of the Plymothian? A. When? After they blew the cross signals?

Q. When they blew the first cross whistles that you heard? A. Yes; the Victory was on the west side" (p. 398).

"Q. In looking down from where you were, you could see the first black buoy below the pier? A. Yes, sir; plain enough.

Q. How did the Victory look with reference to that buoy, as well as you remember, at the time they exchanged those cross signals that you heard? A. She was out pretty near the middle of the channel, from the best I could give you" (p. 399).

The evidence of mate Channell, of the steamboat *Olive*, is most persuasive on this point. He was in the habit of going up and down Elizabeth River with his boat every day of his life. He says he passed the Plymothian just as she came out of the dock, leaving her on the starboard side. He passed between the boats, leaving the Ply-

mothian on his starboard quarter as he went down, and passing the Victory port to port (p. 428).

"Q. What position did she occupy in the channel, the west, middle or east side? A. She looked to me she was just about as close on Craney Island as she ought to have been" (pp. 428, 429).

He thought he passed the Victory at about Craney Island Light, but did not profess to remember exactly about that (p. 428). But as he passed the Plymothian about "as she came out of the dock," and as he was only about a quarter of a mile below Craney Island, turning the buoy to go off on the Flats, at the time of the collision (p. 481) it is apparent that he must have passed the Victory some little distance to the south of the lighthouse.

(**c**.) That Victory made no changes to port until she starboarded about the time her cross signal was heard finds ample confirmation in the evidence from the Victory's deck.

Pilot Nelson admits that he was on the west side of the channel prior to meeting the steamers (p. 335). He does not distinctly state that he made any change of helm on account of the river steamers; whilst on that subject, Captain Elcoate says:

"Q. *Did you have to change your helm for any of those three river steamers?* A. *No, sir*" (p. 152).

It is proved that two of the river steamers passed the Victory port to port and that she was then on the westerly side of the channel (pp. 428, 429, 433). To the same effect, Brown (p. 346).

Nelson says there is a turn in the channel to westward (by port helm) at Craney Island (pp. 335, 339), and he admits having conformed his course to that of the channel, after passing the lighthouse. The general course is south ½ west from Craney Island up (p. 335), and he says that his ship was heading about S. ½ W. (p. 332). He "*kept a straight line up the channel*" after he saw the Plymothian (p. 135), and makes no mention of an actual change of *helm* until he starboarded for two schooners (p. 337). If heading up

properly at Craney Island, he says he would have had to starboard ½ to ¾ of a point to get on the eastern side of the channel and that he did this prior to the collision (p. 339); but a careful reading of his whole evidence, with that of Victory's officers, will show that the change was made very shortly before the collision.

Elcoate says that a short while before stopping his ship the wheel had been starboarded, and subsequently steadied, but the ship was not put back on her previous course before it was steadied (p. 137). He mentions no starboarding until they met the second schooner, which, he says, was astern of him when he ordered his engines reversed, and was going down the channel only a ship's length ahead of the third schooner (p. 147). The latter it is claimed was abreast the vessels at the time of the collision (pp. 333, 57, 69.)

Candlish, mate, testifies they were coming up a pretty fair channel course, keeping right up the line (p. 35) until they starboarded for the first schooner (pp. 37, 47). He admits that both the schooners were sailing up straight in mid-channel (pp. 34, 47). He mentions no starboarding until he reached the schooners. He says they starboarded for the first schooner, about a point (p. 47), and then steadied (p. 37), (making no mention of going back to their original course), and that they also starboarded for the second schooner (pp. 34, 47).

On the question as to where the schooners were met, Candlish agrees with Captain Elcoate that the first schooner was only about a ship's length astern of the Victory at the time of the collision (p. 58) and the second schooner was about abeam at the collision (pp. 57, 58).

Gilbert, the second officer, who was at the wheel, says that between Craney Island Light and the collision the helm was amidships, until he starboarded to avoid two schooners, and that he then steadied it again (pp. 62, 63) without going back to his previous course (p. 78). When he first saw the Plymothian, he says Victory was *heading straight up the channel*, parallel with it. One of the schooners, he says, was on the Victory's starboard at collision, and the other one was about abreast of her (p. 66). He agrees that the schooners were

in line in mid-channel, and says that his ship passed them about 100 feet off (pp. 70, 80), agreeing substantially with Candlish, who says he passed the second about 30 yards off (p. 54). Gilbert says he starboarded ½ a point for the first schooner, and ½ for the second, and steadied each time without going back (p. 78), and that after thus starboarding, the ship was headed about for buoy No. 7, the point of collision (p 78).

He further admits starboarding for the *last* schooner (p. 78).

"Q. Had you starboarded for any of those schooners? A. Yes, sir.

"Q. Which one? A. *All of them.*"

The amount of the starboarding for the last is not given, but conceding 1 point for the first schooner (p. 47), ½ point for the second (p. 78), and something more for the third, enough starboarding by Victory is seen to account for the swing shortly before collision as testified by those on board the Plymothian.

Candlish went on the forecastle head about the time the danger signals were blown, and was looking right over the stem until collision. He says Victory was then heading straight for Lambert's Point Lighthouse (pp. 38, 44), the helm being amidships (pp. 63, 137, 154).

The fact that the Victory was so heading is also testified to by Martin and Page (pp. 320, 315), who stood by the lighthouse on the pier.

It will be seen from chart Exhibit X (Appendix) that a line drawn from Lambert's Point Lighthouse across buoy No. 7, the place of collision, and extended would touch mid-channel, 350 yards from the buoy. If Victory was on that course, as alleged, it is plain that she was as far west as mid-channel when three lengths from the place of collision.

The testimony as to what vessels were met with by the Victory, and where each was met, has already been adverted to (*ante*, pp. 34, 35, 59). It seems clear that the schooners for which the Victory starboarded, and which were the first vessels for which she did starboard, were

encountered not far from the place of collision; that the starboarding for each of them, and the hard-starboarding which it is admitted was done after the reversal of her engines, accounts for the rank sheer to port observed by those on the Plymothian at the time they took precautions for safety.

It is admitted the first two schooners were in mid-channel (Candlish, pp. 34, 47; Gilbert, pp. 70, 71, 80; Elcoate, p. 146), and that the Victory passed the second schooner about one hundred feet off (Elcoate, p. 133; Gilbert, pp. 70, 80).

The channel being at that point at least a thousand feet wide, the Victory, on her own showing, was then more than four hundred feet west of the line of buoys 7 and 9. Taking the further statement of her witnesses as true, that this second schooner was not more than a ship's length astern of them at the collision (Candlish, p. 58; Gilbert, p. 66; Elcoate, p. 147), we determine positively on their own showing that the Victory herself was about mid-channel when about three lengths away from the place of collision.

This is also to be inferred not only from the evidence that for some time prior to the collision she was heading on a line passing through buoy 7 to the lighthouse on Lambert's Point pier (pp. 38, 44, 320, 315),—a line which would touch mid-channel three hundred and fifty yards from the buoy—but also from Elcoate's evidence that his helm was amidships when his two double blast signals and his three blast signal are alleged to have been blown, and continued amidships until he reversed the engines (p. 154; also Candlish, p. 63). The only conclusion to be drawn from this testimony as to the helm is that the starboarding which put the vessel on a course heading through buoy 7 to the lighthouse at the end of Lambert's Point pier was completed and the helm steadied before Elcoate blew any of his alleged signals, and that course, as before stated, worked backwards, leads across mid-channel three hundred and fifty yards from the buoy.

Victory's witnesses sought to account for this heading at collision, by claiming that when they began to reverse, the tide canted the stern of their vessel out into the channel, and her bow in towards buoy 7. This, however, is an

obvious impossibility. As the power which would draw the vessel back against the tide, on a reversal of the engines, was at the stern of the ship, against which the tide was running, the effect of reversing obviously would be to hold that end of the ship up, whilst the bow being free to swing, would tend to go over, to the tide line, instead of athwart it. The tendency would plainly be for her keel line to conform to the tide line as soon as the reversed actions of the engines was felt. The action of the propeller in such case would be the same as a string attached to the end of a long stick, held up against the current of a brook.

4. *The Plymothian was justified in presuming the Victory would pass port to port until some contrary sign appeared which produced an actual risk of collision.*

"Rules of navigation," as was said by this Court in The *Johnson*, 9 Wall., 146, 152, "are obligatory upon vessels approaching each other from the time the necessity for precaution begins, and they continue to be obligatory as the vessels advance, so long as the means and opportunity to avoid the danger remain. They are not strictly applied to a vessel which is otherwise without fault, in cases where proximity of vessels is so close that collision is inevitable, and they are wholly inapplicable when the vessels are so distant from each other that measures of precaution have not become necessary to prevent a collision."

When these vessels were as far apart as buoy 9 and Craney Island they were in no risk of collision, and the only rule then applicable to them was that each should keep to its own starboard side of the channel, so as to avoid any risk as they came nearer. Each was entitled to presume that the other would act lawfully; would keep to its own side; if temporarily crowded out of her proper course would return to it as soon as possible; and that each would pursue the customary track of vessels in the channel, regulating its action so as to avoid danger rather than to incur it (The *Servia*, 149, U. S., 144; The *City of New York*, 147 U. S., 72; The *Josephine*, 20 U. S. App.,

105. The *Harrisburg*, 9 Fed. Rep., 169. The *Free State*, 91 U. S., 200. The *Bridgeport*, 6 Blatchf., 3. The *Nessmore*, 41 Fed. Rep , 437. The *Northfield*, 154 U. S., 629, 630. The *Delaware*, 161 U. S., 469).

Prior to the starboarding by the Victory, at or about the time she blew the two-blast signal that was heard on the Plymothian, there was no risk of collision between the vessels under the rules laid down in the foregoing cases. Up to that time, whether she had been in the westerly part of the channel, or in mid channel, or even slightly to the east of mid-channel, she had always been on the Plymothian's port bow and so heading that the vessels would pass port to port. There was no obligation on Plymothian to take any precautions under Rule 21, although the reduced speed at which she was proceeding against the tide was equivalent to a "slackening" within the meaning of that rule. She was not bound to do any more, for until then the Victory appeared to intend to keep on her right course and pass port to port.

In The *Free State*, 91 U. S., 200, 205, Mr. Justice HUNT, delivering the opinion, dealt with this point as applied to channels as follows:

"The appellants insist that the rule of law is this: that where a steam vessel is approaching another vessel, and where a collision might be produced by a departure of the latter from the rules of navigation, the former vessel is bound to slacken her speed, or stop and reverse. We have examined with care the authorities cited by the appellants, but we find none that sustains this proposition. The rule is otherwise.

"If two steamers are meeting each other end on, or nearly so, where there is plenty of sea room, and at a considerable distance from each other, it is not the duty of either to stop, reverse or to slacken. The duty of each is to pass on the port side, and the rate of speed is not an element in the case. The risk of collision is not present under such circumstances."

So long as the vessels were port to port the Plymothian proceeding at moderate speed, was not bound to stop or reverse, against the chance that the other vessel might

depart from the rules of navigation. So long as she was not seen to be departing from them, the Plymothian was not in fault for keeping on (The *Adriatic*, 107 U. S., 512; The *Jesmond*, 4 P. C., 1; The *John King*, 1 U. S. App., 60).

It is not shown that any earlier reversing on her part would have averted the disaster. All the Court of Appeals says is that "*it might have been prevented.*" The real question is, was she bound to stop earlier?

5. *The Plymothian would not have been bound to stop and reverse at once if she had heard a prior two-blast signal from the Victory at the time she claims to have blown it.*

Plymothian was under reduced speed, equivalent to a slackening under Rule 21; no risk of collision would have been involved at that distance (900 yards), and she might have relied on her repeated single blast to correct the Victory's error until it became apparent from a further answering cross-signal, or from a change of heading, that she was persisting in her error.

The case is similar in its main features to that of The *Stephanotis and the Horton*, decided by the Court of Appeals in England, July 24, 1894, reported in the *Shipping Gazette and Lloyd's List*, July 26, 1894 (printed in full in Appendix to this Brief, p. 27).

In that case, the collision occurred in the River Tyne. The case for the *Stephanotis* was that she was bound up, keeping to the north side of the navigable channel, at moderate speed, in a snow storm, when the *Horton* was observed about 250 yards off, also on the north side of the river, in such position as to make it impracticable for the *Stephanotis* to pass up between the *Horton* and the buoys. She thereupon sounded two short blasts and starboarded her helm, afterwards repeating the signal. A short blast was then heard from the *Horton* which was seen to be approaching as if under a port helm. The *Stephanotis* came ahead, helm astarboard, her engines going full speed ahead, as the only means of avoiding a collision.

The case for the *Horton* was that she was keeping to

the south of mid-channel going down the river at the rate of about four knots. The *Stephanotis* was seen coming up the river about half a mile away, bearing right ahead. The *Stephanotis* thereupon blew one blast, to which the *Horton* responded with one blast, and then ported and steadied her helm. When the vessels were in a position to pass clear port to port the *Stephanotis* blew two short blasts, and the *Horton*, *after replying with one short blast*, again slightly ported her helm. The *Stephanotis*, however, blew two more blasts, and, as she was then seen to be under a starboard helm, the *Horton's* whistle was blown a short blast, and her engines were set full speed astern, but the *Stephanotis* struck the *Horton*, doing her great damage.

The Master of the Rolls (Lord ESHER), in giving judgment, said:

The advice which we have received from the gentlemen who assist us is precisely that which struck me the moment I heard the circumstances of this case. The advice to us is that there was time and distance for the *Stephanotis* to have ported after the *Horton* blew one blast, and that the master of the *Horton* might reasonably have expected that he would do so. When the master or pilot of the *Horton* heard the first two whistles which were the beginning of the other man's starboarding, and when at that moment starboarding could have but little effect, *he had a right reasonably to suppose that the man who at that moment was starboarding his helm, or was beginning to do so, seeing him there, and being told by him that he was porting, would have ample time and distance, if he did not choose to persist in starboarding, to have put his helm to port, or to have ceased starboarding, and then they would have gone clear*. But he persisted in starboarding. Then comes the question, ought the pilot or captain of the *Horton* to have stopped or reversed, or stopped even, at that moment when the other was beginning to starboard? The answer is that his beginning to starboard could hardly have been for the *Horton*, but must have been for some other reason, and that the master and pilot of the *Horton* might reasonably have supposed that when, if anybody had looked, they must have seen the *Horton*, and must have known that the *Horton* was porting—they had a right to suppose that the *Stephanotis* would stop starboarding immediately, and would have ported her helm.

If so it was not unreasonable and unseamanlike, I think, for the *Horton* to keep on as she did. By the time that two ship's lengths were passed over by the two vessels approaching each other—that is the time of the second blast—the collision was inevitable. It seems to me that the judgment of the President, and the advice of his Trinity Masters, was too severe. It was requiring men to do what no man ought to be expected to do under such strange circumstances. Therefore, with great deference, I disagree with the severity of their sentence, and think the *Stephanotis* ought to be held solely to blame.

Lord Justice A. L. SMITH: There can be no doubt in this case that those in charge of the *Stephanotis* were to blame. Nobody says they were not. The learned Judge says they were, and there is no appeal against that finding. But it is said that those in command of the *Horton* are also guilty of neglect, and guilty of faulty and bad seamanship in not stopping and reversing at an earlier period. It is said that when those on board the *Horton* heard the first two blasts which came from the *Stephanotis*, the captain and those in charge of the *Horton* should then and there have made up their mind that the *Stephanotis* was going to perform the act which she did. The nautical assessors advise us that if the *Stephanotis* had not persisted in the maneuver that she did persist in, and had gone back to port helm, everything would have gone well. Therefore, in my judgment, there is no negligence on the part of the *Horton* in not having made up her mind instantly that the *Stephanotis* was going to act as she did. In my judgment it has not been made out that the *Horton* has been guilty of negligence, and, therefore, the *Stephanotis* should be held solely to blame.

In The *Florence* (68 Fed. Rep., 940, 942), where fault was charged against the *Florence* for not stopping immediately because a two-blast signal was blown to her, and for answering it with a single blast and keeping on, the court held that this was no fault as there was time for the other vessel to correct her error and perform her legal duty. The argument made by the cargo in this case that if the Plymothian had heard a prior two blast signal she should have stopped earlier than she did, was there answered. BROWN, *J*, said (p. 492):

"I do not perceive that the *Florence* is chargeable with fault contributing to the collision. It is true that her master testifies that if he had observed the long whistle

of the *Eldorado* while he was slowed up for the *Peene* to pass ahead of her, he would not have gone ahead full speed, but would have waited to let the *Eldorado* also go ahead of him. This, however, would have been a voluntary concession. It was not obligatory. But he did not observe the *Eldorado's* long whistle because preoccupied probably with the navigation of the *Peene*. The failure to hear the *Eldorado's* whistles was not, however, a contributing cause of the collision, because it did not mislead the *Eldorado*, nor give her the least apparent right to go ahead of the *Florence*. It was practically equivalent to an express dissent, because the *Eldorado* had no right to go ahead without an express assent of the *Florence*. * * * *When the Florence gave the Eldorado a signal of one whistle there was abundant time for the Eldorado to keep away by reversing, and the Florence had a right to expect her to do so.*"

The suggestion so strenuously urged by the underwriter's counsel that Captain Mardon *would* have stopped earlier if he had heard a prior cross signal ignores the real point. The question is, would he have been bound to stop?

In *Williamson* v. *Barrett*, 13 How., 101, 109, Mr. Justice McLean, in delivering the opinion of the Court, dealt with a similar suggestion:

"Before, however, any such instruction" [that a vessel should have reversed in addition to stopping] "could be properly claimed," he said, "the defendants must have made out a state of the case to which it was applicable, and from which the omission to make the movement laid a foundation for the inference of fault on the part of the *Major Barbour*. The fact that it would have prevented the catastrophe is not enough; circumstances must be shown that would make it the duty of the master to give the order. There is no rule of law, or of the river, that imposes upon him, in such an emergency, the obligation to give a particular direction to his vessel, simply because it might avoid the danger. The question in all such cases is, whether, in the exercise of due care and caution in the management of her at the time in any given case, such a direction should have been given."

(**6**) *No fault on the part of the Plymothian has been established, nor indeed alleged, under Inspectors' Rule 3.*

This rule provides that, "if, when steamers are approaching each other, the pilot of either vessel fails to understand

the course or intention of the other, whether from signals being given or answered erroneously, or from other causes, the pilot so in doubt shall immediately signify the same by giving several short and rapid blasts of the steam whistle; and if the vessels shall have approached within half a mile of each other, both shall be immediately slowed to a speed barely sufficient for steerage way until the proper signals are given, answered and understood, or until the vessels shall have passed each other."

In bringing this rule into the recent act of Congress providing a code for inland waters, it has been altered so as to read:

"Rule 3. If, when steam vessels are approaching each other, either vessel fails to understand the course or intention of the other, from any cause, the vessel so in doubt shall immediately signify the same by giving several short and rapid blasts, not less than four, of the steam whistle."

This leaves out the part of it which made fault depend upon a tape line measurement.

(**a.**) It is to be noticed that the fault under this rule was not specifically alleged, either in the pleadings of the Victory or in those of the cargo.

The fault alleged by the Victory was "in not promptly stopping and backing" (pp. 2, 19). That of the cargo (pp. 7, 17) was "in that she did not, when the Victory failed to reply to their signal, or, at any rate, when the Victory gave the signal of two blasts, indicating that she was proposing to go to the eastern side of the channel, instantly stop and reverse."

It is not charged in either case that the Plymothian received any cross signal when "within a half mile" of the other vessel except the one received at the time she stopped and reversed; nor is it alleged that her pilot "failed to understand the course or intention of the other" or was "in doubt" about it. If the earlier signal was given at Craney Island, as seems to have been the case, the vessels were then a mile and an eighth apart. If it was given when half way between buoy 7 and Craney Island, it was given when she was 600 yards from buoy 7, and, as at

that time the Plymothian must have been at least 300 yards below Buoy 7, the distance between the vessels would be 900 yards, or more than half a mile, as the District Judge found (p. 455). If that was not the signal the Plymothian heard and acted on, there must have been a second one; and, as on the Victory's own evidence, that was blown within half a minute or a minute afterwards, and as the Plymothian immediately did more than was required by Rule 3, in that she immediately reversed and went full speed astern, it is evident that she was guilty of no fault under this rule. Neither of the lower Courts has found that she was.

The Court of Appeals for the First Circuit declined to find a vessel in fault for a violation of one of the Inspectors' rules where there was no specific allegation of such fault in the libel (*Towboat No.* 1, 76 Fed. Rep., 906, 909).

(**7.**) *The headway of the Plymothian was completely stopped at the collision.*

Her full speed was about 7 knots (p. 273), but on this occasion, prior to reversing, was about 4 to 4½ knots, the tide being against her with a force of about 2 knots (pp. 27, 360, 361). At full speed she would probably have stopped in about four times her length, and in about three minutes.

The testimony of her third engineer that she could stop in a minute, is clearly only an estimate, so plainly erroneous, when compared with the actual experiments of experts on vessels of different size, as to be entitled to no weight (The *Normandie*, 43 Fed., 151, 159, *note*). Proceeding at her speed, against tide, it seems probable that she would have stopped in from two and a half to three minutes.

After making slight allowances for errors in recording time in the engine-room, it seems that her engines were ordered astern between three and four minutes before the collision (p. 282). Allowing for putting the engines over, and for their slow backward movement when first reversed, it is certain the engines must have been going astern between two and three minutes before collision.

This would be sufficient not only to stop her headway against the tide, but to give her some sternway, and it is testified by some of the witnesses that she had sternway when struck.

This is also indicated by the fact that buoy 7, which had been slightly overlapped by the starboard bow, prior to collision, was around on the port bow after the blow was received, and had crossed in front of the stem (pp. 40, 50, 161, 220, 274, 275, 338).

The Victory contends that the Plymothian could not have been stopped, because some part of her side and beams was found on the Victory's 'tween-deck, but it has been testified that if the Plymothian had been under way the after edge of the cut in her side, as shown on the photograph on file, would have been less straight (p. 414). The argument based on this piece of iron is insufficient to overcome the clear preponderance of evidence to the contrary.

A similar argument was addressed to the Court in the case of The *Luckenbach*, 8 U. S. App., 9. MORRIS, *J.*, in delivering the opinion of the Court said:

"The appellants contend that the direction of the cut into the tug's bow shows that the tug, at the time of collision, had stopped, and that the *Georgia* was going ahead, and therefore had not promptly reversed; but the direct proof is too strong to be overcome by inferences drawn from the testimony on that subject. The immediate and primary cause of the collision was the imprudent speed of the tug and her want of caution in rounding Town Point so close to the wharves. The burden is upon her to establish some fault or neglect on the part of the *Georgia* contributing to the disaster; and this, we agree with the District Court, the appellants have not succeeded in doing."

In the present case the District Judge apparently reached a similar conclusion. His finding on the point was, that—

"*The headway of the Plymothian was overcome, and it is possible she had attained a slight backward movement*" (p. 451).

(8.) *As to all the above matters the burden of proof is on the Victory and on the cargo. The evidence not only falls short of being clear and convincing that the Plymothian was in any fault contributing to the collision, but, as we submit, it affirmatively establishes the contrary.*

IV.

The Court of Appeals erred in overruling the finding of fact made by the District Judge on the conflicting evidence of witnesses produced before him, that the headway of the Plymothian was completely stopped at the time of collision.

Though it is not explicitly stated anywhere in Judge Simonton's opinion, that the way of Plymothian was not stopped at the time of collision, the imposition of damages upon her, necessarily implies that she contributed to the collision by some forward movement on her part. This is also to be inferred from some passages in the opinion. It is said (p. 502):

" Each doggedly kept her course, without taking any precaution whatever *until too late*, and when the pending collision became inevitable. * * * We cannot find anything in this record which shows any precaution taken by the Plymothian when she saw the Victory disregarding her signals and obstinately pursuing her course. The only thing which she did was simply to repeat the disregarded signal. Even that was not done until it became too late to avoid a collision (p. 503.) * * * The Plymothian was guilty of an "act of omission. The course of the Victory seems almost willful. The Victory was the chief cause of the disaster. If the Plymothian had taken the precautions which she should have taken, THE DISASTER *might have been prevented*" (p. 503).

In saying that the Plymothian "doggedly kept her course, without taking any precaution whatever until too late," it is assumed the Court meant until too late for her

to stop her headway before collision; for if the Court meant to say that the Plymothian, under any circumstances was bound to do more than to be completely stopped at the time of collision, more than to have become a stationary object, such as an anchored vessel, it imposed obligations on her in excess of those stated in the regulations. All that Rule 21 requires is that "every steam vessel, when approaching another vessel so as to involve risk of collision, shall slacken her speed, or if necessary, stop and reverse." It does not require the vessel to back away.

If the Plymothian had no headway over the ground at the time of collision, she was not in any fault contributing to it.

In the recent case of the *Nymphea and the May*,* BROWN, *J.*, stated the rule on this subject, in a fog case, as follows:

"In the present case, if it were clearly established that either vessel in fact came to a stop in the water before collision, she should be exonerated, and the whole blame fall upon the other."

In the *Corsica*, 9 Wall., 630, 634, the Court said:

"It is also evident that the *Corsica* was under considerable headway when the collision occurred. The force of the blow proves this. *The 'American' did not contribute to the effect of the blow, for the weight of the evidence is that she was backing away from the 'Corsica' at the time.*"

In the *Umbria*, 166 U. S., 404, 417, BROWN, *J.*, said:

"The general consensus of opinion in this country is to the effect that a steamer is bound to use only such precautions as will enable her *to stop in time to avoid a collision*, after the approaching vessel comes in sight, provided such approaching vessel is herself going at the moderate speed required by law" (see also pp. 420, 421).

---

* District Court, Southern District of New York. Opinion, dated October 6, 1897, as yet unreported.

The finding of fact made on this subject by the District Court, was explicit (p. 451):

"The two steamers thereupon, and at the same time, blew alarm whistles, and at once backed their engines at full speed, and this backing of engines continued until the collision occurred. *The headway of the Plymothian was overcome, and it is possible she attained a slight backward movement.* The headway of the Victory was not overcome, and she ran into the Plymothian's broadside, with such force as to drive fifteen inches into her side, and to render immediate beaching necessary."

The direct evidence that the Plymothian's headway was fully stopped at the collision, is that of Mardon (p. 266), Lyons (p. 211), Baird (p. 232), Wood (p. 239), Schroder (p. 203), Ham (p. 193), witnesses from the deck of the Plymothian, who were examined by deposition before the trial; of Henley (p. 362), Etheridge (p. 355), Harrison (p. 395), Goodwin (pp. 374, 375), Clark (p. 388), and Wynne (p. 405), all of whom were examined in the presence of the Court.

The evidence opposed to this was very slight, coming mostly from the Victory's officers and crew (p. 40, 41, 96, 98, 109, 110, 119, 140) examined before trial, and from the witnesses Nelson (p. 333) and Pratt (p. 307), who were examined before the Court. A conflict of evidence was thus presented upon which the credibility of the witnesses had a most important bearing. The Court may also have drawn inferences from the failure of Victory's other disinterested witnesses to speak to this point.

The rule repeatedly laid down in such cases is that the Appellate Court should not reverse a finding of fact made by the District Court upon conflicting testimony of witnesses produced before him, unless it appears to be clearly against the weight of evidence (The *Charles Hebard*, 6 U. S. App., 641; The *Warrior*, 7 U. S. App , 559; The *Royal*, 14 U. S. App., 30; *City of New York*, 14 U. S. App., 39; The *Shackamaxon*, 26 U. S. App., 694; The *Jersey City*, 1 U. S. App., 244; The *Niagara & The Express*, 1 U. S. App., 658.; The *Grafton*, 1 Blatchf., 173; The *Sampson*, 4 Blatchf., 28; The *Florida*, 4 Blatchf., 470; The *Sunswick*, 5 Blatchf., 280; The

Guimarais, Appeal, 28 Fed., 528; The *Thomas Melville*, 37 Fed., 271; The *Albany*, 48 Fed., 565; The *Alijandro*, 56 Fed., 621; The *Wilhelm*, 59 Fed., 169; The *Phoenix*, 58 Fed , 928).

These cases proceed upon the theory that the character and demeanor of a witness—amongst the most important ingredients in his evidence—cannot be sent up to the Appellate Court as a part of the record, and upon the presumption that the findings of the District Court are based upon sufficient evidence. Unless the contrary be shown, it is assumed that the District Court attached more weight to the evidence of the witnesses testifying in accordance with his finding, than to that of those who testified to the contrary. The character and demeanor of the witnesses who testified in accordance with the District Court's finding are presumed to have made the evidence preponderate to that effect.

In the present case, it cannot be said the evidence was clearly against the District Court's finding. The most that can be said is that it was made on a conflict of proof. There are peculiar reasons why the finding of the District Judge should have been adopted. The pilots of both vessels, and seventeen of the twenty-one disinterested witnesses to the collision, were examined in open Court. The long and wide experience of the District Judge, his practical acquaintance with the local waters, his presumptive knowledge of the character and credibility of the witnesses, especially fitted him to judge of and determine the weight that should be accorded to their evidence. In the absence of a clear weight of evidence against his finding, the Court of Appeals erred in holding that the Plymothian contributed to the collision by her headway at the time the vessels struck.

V.

Plymothian was not in fault on the score of lookout.

(**a**.) No fault was found against her on this ground, either in the District Court or in the Circuit Court of Appeals.

The District Judge, indeed, was of opinion that she ought to have had a lookout stationed in the bows, but held that any fault in this respect did not contribute to the collision, as her captain, pilot and third officer were all on the bridge, and, the view being clear and unobstructed, were in position to see everything perfectly, did see the Victory's changes and got their own ship fully stopped before the collision.

The master himself was engaged in keeping lookout. The only fact in connection with which the question of lookout could be important relates to the failure of those on the Plymothian to hear an earlier two-blast signal blown by the Victory. But this signal itself is involved in grave contradiction of testimony (*ante*, p. 45). If it was blown when the ship was below Craney Island Lighthouse (as testified by a number of the witnesses, notably by Captain Wynne of the tug Lumberman who was directly abreast of the Victory, and therefore best qualified to testify as to her position in the channel when she blew it), then it would be unimportant whether it was observed on the Plymothian or not. The vessels were more than a mile and an eighth apart at that time. The signal itself was not followed by any change of course on the part of the Victory, which, prior to passing Craney Island and for some time afterwards, was well on the westerly side of the channel and on the Plymothian's port bow. The Plymothian blew three single-blast signals after that, which were not dissented from by the Victory until the last one (pp. 271, 360, 361). That dissenting signal and the change of course were both observed and the proper manœuvers were taken to avoid the risk they created. If, on the other hand, it be found on the Victory's evidence that her first two-blast signal was blown when she was half way between Craney Island Light and buoy 7, the vessels would still be over a half mile apart, with room to correct the proposed erroneous course. Her evidence that she blew her second blast inside of a half minute after the first should also be considered in this connection; and, as the Plymothian heard one of these signals and immediately acted on it, at the first indication of any change of course, the failure to hear the other one, whether blown a half

minute before or after the one she did hear, ought not to be considered a fault.

(**b.**) The cargo's claim that fault in the Plymothian is to be presumed from the absence of lookout is not tenable.

The presumption of a fault only arises from the failure to obey some statutory regulation. The cases cited by the cargo's counsel go only to that length. There is, however, no statutory rule which prescribes that in all circumstances a lookout shall be placed in the bow.

(**c.**) This Court has repeatedly held that the absence of a special lookout in the bow is immaterial, unless there be proof that his absence contribued to the collision (*The Bluejacket*, 144 U. S., 371, 389, 390; *The Nacoochee*, 137 U. S., 330, 341; *The Oregon*, 158 U. S., 186, 195; JACKSON, *J.*, in *The Ontario*, 41 Fed. Rep., 793, 798).

The Plymothian maneuvered in time to be wholly stopped before the collision and therefore did not contribute to it by the want of a lookout or otherwise.

VI.

The Plymothian, if in any degree at fault for the collision, is freed from responsibility to her cargo by the express provisions of the bills of lading under which she carried it.

(**a.**) By a stipulation with exhibits annexed (pp. 483, 493), it is agreed that of the cargo of 3,682 bales of cotton shipped on the steamer at Galveston, 1,671 bales were shipped thereon under bills of lading of the Texas European Steamship Line, all of which contained, amongst other provisions, the following:

"It is mutually agreed that the vessel shall not be liable for loss or damage occasioned by collisions, stranding or other accidents of navigation, of whatsoever kind (even

when occasioned by the negligence, default or error of judgment of the pilot, master, mariners or other servants of the shipowners, not resulting, however, in any case from want of due diligence by the owners of the vessel, or by any of them, or by the ship's husband or manager). * * * *This contract shall be governed by the law of the flag of the vessel carrying the goods.* * * * In accepting this bill of lading, the shipper, owner and consignee of the goods, and the holders of the bill of lading, agree to be bound by all its stipulations, exceptions and conditions, whether written or printed, as fully as if they were all signed by such shipper, owner, consignee or holder, any custom of the port notwithstanding" (p. 483).

The other 2,011 bales of cotton were shipped from interior points under bills of lading given by the inland carrier to the shipper.

Upon reaching Galveston, the cotton was delivered by the inland carrier to the Plymothian, which issued, upon receiving the said cotton on board, other bills of lading or receipts therefor to the inland carrier, all of which contained both the negligence and flag clauses in substantially the language hereinbefore set forth (p. 484).

The bills of lading given by the inland carriers contained the negligence clause as above set forth, but did not contain the flag clause (p. 484).

There were thus three different forms of bills of lading before the District Court.

It was agreed further (p. 484) that originals or copies of the three *forms* of bills of lading should be produced, and three such bills were actually produced and used (p. 484) in the Court below (pp. 488, 494).

The so-called inland bill of lading No. 48 (p. 494) issued by the Gulf, Colorado and Santa Fé Railway, provided that the goods should be carried by that railroad to the seaboard only, and that it had

"liberty to forward the goods or property to port of destination by any other steamer or Steamship Company than that named [Steamship Sandfield], and this contract is executed and accomplished, and the liability of the Gulf, Colorado and Santa Fé Railway as common carriers thereunder, terminates on the delivery of the goods or

property to the steamship or Steamship Company, or their agents at Galveston, Texas" (p. 495). And further (at p. 497), it was provided:

"The liability of the Gulf, Colorado and Santa Fé Railway Company is hereby limited to its own lines of railway, and is to cease upon delivery to the next succeeding carrier of the articles specified herein."

There was a further clause stating that the goods were to be transported from the port of Galveston, Texas, to the port of Liverpool, England, by the steamship *Sandfield*, with liberty to ship by any other steamship or steamship company, subject (amongst others) to the following terms and conditions, namely:

"Negligence or default of *pilot*, master, mariners, engineers or other persons in the service of the ship, whether in navigating the ship or otherwise * * * or any other accidents of the seas, rivers and steam navigation, of whatever nature or mind soever" (p. 496), "and of collision" (p. 495) "excepted."

The bill of lading also contained the following (494):

"☞ The property covered by this bill of lading is subject to all the conditions expressed in the customary forms of bills of lading in use by said steamships or Steamship Company at time of shipment."

There was also a provision, that if the cargo had to be forwarded from the port of discharge to any other place, it should be "subject to all conditions which may be exacted by the companies or individuals who may complete the transit" (p. 497).

The effect of these provisions would seem to be that the bill of lading No. 48 of the Gulf, Colorado and Santa Fé Railway Company was a contract to carry to the seaboard merely, and to forward the goods from there upon the terms and conditions of the steamship's form of bill of lading, and that the shipper, by the terms of the contract, made the first carrier his agent, to agree upon carriage from the seaboard to the port of destination, upon the terms and conditions in the form of the steamship's bill

(*Moore* v. *Harris*, 1 App. Cas., 318; 3 Asp., 173; *Duluth & Marquette Ry.* v. *F. & M. Bk.*, 20 Wis., 122; *Hinckley* v. *N. Y. Central*, 56 N. Y., 420; *Watts* v. *Saxon*, 11 La. An., 43; *Union Ex. Co.* v. *Shoop*, 4 Norris (Pa.), 325).

In point of fact, steamship's bills of lading were issued by the master at Galveston for the cotton covered by the inland bills expressing the terms upon which he undertook to carry it from Galveston to Liverpool (p. 493), and the present representatives of the cargo brought the master's bills of lading into Court in proving their claims against the steamship in these proceedings. All the parties, therefore, apparently concede by their acts that the ship's bills of lading are those governing the rights of the parties and not the inland bills.

The form of the ship's bill covering the goods mentioned in the inland bills is contained in the record (pp. 488, 493), and provides:

"That the contract shall be governed by the law of the flag of the vessel carrying the goods" (p 492).

It also provides (at p. 493):

"The goods referred to in this bill of lading are such portion of those mentioned in the through bill of lading No. 48, contract 287, dated October 7, 1891, and shipped at Ardmore by N. P. Anderson & Company (for steamship Sandfield), as have been actually put on board the steamer; but the said goods are only carried on the terms and conditions of this present ocean bill of lading, and are to be delivered upon presentation of the said through bills of lading and this ocean bill of lading together."

(**b.**) It was further stipulated between the parties (p. 484):

"That the law of Great Britain in respect to the validity of the foregoing provisions and exceptions appears in the printed reports of the opinions of the courts of that country, and that reference may be had in the briefs, and upon the arguments of counsel to such printed reports as proofs in this case of the law of Great Britain, in respect to such provisions and exemptions, with the same force and effect as though the same had been formally proved and printed in the record."

Cases illustrative of the English law on the subject of Negligence Clauses, to which reference is made under the foregoing stipulation, are: *Chartered Bank* v. *Netherlands Steam Nav. Co.*, 10 Q. B. D., 521; 5 Asp., 65; The *Duero*, L. R., 2 Adm. and Eccl. 398; *Taubmann* vs. *Pac. Steam Nav. Co.*, 26 L. T. N. S. 704; *Steel* vs. *State Line S. S. Co.*, L. R., 3 App. Cas., 72; *Manchester S. & L. R. Co.* vs. *Brown*, L. R., 3 App. Cas., 703; *Grill* vs. *General Iron Screw Collier Co.*, L. R., 1 C. P., 600; The *Cressington* (1891, Prob. 152).

English cases as to responsibility for the neglect of a pilot, to which reference is also made, are: *Carruthers* vs. *Sydebotham*, 4 M. & S., 77; The *Maria*, 1 Wm. Robb., 95; The *Agricola*, 2 Wm. Rob., 10; The *Bilboa*, Lush., 149, 154; The *Halley*, L. R., 2 P. C., 193; The *Hector*, 8 P. D., 218, 224; *General Steam N. Co.* v. *B. & C. S. N. Co., Ltd.*, L. R., 3 Ex., 330.

Pilotage under the laws of Virginia is compulsory. (Code of *Virginia* (1887), §§ 1963, 1965, 1976).

The collision occurred in pilotage waters. "*To the pilot, therefore, temporarily belongs the whole conduct of the navigation of the ship, including the duty of determining her course, speed*, and the time, place and manner of anchoring her" (The *Caledonia*, 157 U. S., at p. 402).

The Plymothian being a British ship, and flying the British flag, the law of England was that in contemplation of which the parties are deemed to have contracted.

(**c**.) Where it appears expressly that the parties contracted with reference to a foreign law, it is the law of this country that such foreign law *prima facie* should be applied in expounding the contract (*Wayman* v. *Southard*, 10 Wheaton, 1, 48; *Pritchard* v. *Norton*, 106 U. S., 124, 137; *Watts* v. *Camors*, 115 U. S., 353, 362; *Liverpool Steam Nav. Co.* v. *Phenix Ins. Co.*, 129 U. S., 397, 447; The *Oranmore*, 24 Fed., 922, 928; *Dobell* v. *S. S. Rossmore Co.* (1895), 2 Q. B., 408).

By that law the Plymothian would not be liable either for the negligence of the pilot or for that of the officers or crew.

The Court of Appeals assigned no reasons for its refusal to apply the law the parties adopted. Its reason is assumed to have been that by our law the negligence clause would be invalid, as opposed to public policy, and that this affords a sufficient ground for refusing to administer the foreign law. If that be the ground of the Court's refusal, we submit that it was insufficient.

This case thus brings before the Court for determination a question never here decided, namely, whether the negligence clause exempting the ship from responsibility for the negligence of her compulsory pilot, or of its own officers, will be upheld as a valid contract where it expressly provides that it is to be governed by the law of the country to which the steamship and the consignee of the merchandise both belong.

In *Liverpool Steam Co.* v. *Phenix Insurance Co.*, 129 U. S., 397, the intimations of the Court were that the foreign law would be applied, if the parties evinced a clear intention in their contract to be governed by it; and there was no suggestion in the opinion that such law would not be enforced, merely because in upholding negligence clauses it differed from our own.

Mr. Justice GRAY, in delivering the opinion (p. 447), said:

"The general rule as to what law should prevail in case of a conflict of laws concerning a private contract was concisely and exactly stated before the Declaration of Independence by Lord Mansfield (as reported by sir William Blackstone, who had been of counsel in the case) as follows:

"'The general rule established, *ex comitate et jure gentium*, is that the place where the contract is made, and not where the action is brought, is to be considered in expounding and enforcing the contract. But this rule admits of an exception when the parties (at the time of making the contract) had a view to a different kingdom (*Robinson* v. *Bland*, 1 W. Bl., 234, 256, 258; s. c., 2 Burr., 1077).'"

Again (at p. 461):

"Both parties, or either of them, may have supposed the stipulation to be valid; or both or either may have

known that by our law, as declared by this Court, it was void. In either aspect there is no ground for inferring that the shipper at least had any intention, *for the purpose of securing its validity, to be governed by a foreign law*, which he is not shown, and cannot be presumed, to have had any knowledge of. * * *

"Our conclusion on the principal question in the case may be summed up thus: Each of the bills of lading is an American and not an English contract, and so far as concerns the obligation to carry the goods in safety, is to be governed by the American law, and not by the law, municipal or maritime, of any other country."

In *Pritchard* v. *Norton*, 106 U. S., 124, 136, Mr. Justice MATTHEWS (136, 137) stated the rule as follows:

"The law we are in search of, which is to decide upon the nature, interpretation and validity of the engagement in question, is that which the parties have, either expressly or presumptively, incorporated into their contract as constituting its obligation. It has never been better described than it was incidentally by Ch. J. Marshall in *Wayman* v. *Southard*, 10 *Wheat.*, 48, where he defined it as a principle of universal law: 'The principle that in every forum a contract is governed by the law with a view to which it was made.' The same idea had been expressed by Lord Mansfield in *Robinson* v. *Bland*, 2 *Burr.*, 1077. 'The law of the place,' he said, 'can never be the rule where the transaction is entered into with an express view to the law of another country, as the rule by which it is to be governed.' And in *Lloyd* v. *Guibert*, *L. R.*, 1 *Q. B.*, 120, in the Court of Exchequer Chamber, it was said that 'It is necessary to consider by what general law the parties intended that the transaction should be governed, or rather by what general law it is just to presume that they have submitted themselves in the matter' (*Le Breton* v. *Miles*, 8 *Paige*, 261).

"It is upon this ground that the presumption rests, that the contract is to be performed at the place where it is made, and to be governed by its laws, there being nothing in its terms, or in the explanatory circumstances of its execution, inconsistent with that intention.

"So, Phillimore says (4 Int. Law, 469): 'It is always to be remembered that in obligations it is the will of the contracting parties, and not the law which fixes the place of fulfillment—whether that place be fixed by *express words* or by *tacit implication*—as the place to the jurisdiction of which the contracting parties elected to submit themselves.'

"The same author concludes his discussion of the particular topic (4 Int. Law, Sec. DCLIV., pp. 470-471) as follows:

"'As all the foregoing rules rest upon the presumption that the obligor has voluntarily submitted himself to a particular local law, that presumption may be rebutted either by an express declaration to the contrary, or by the fact that the obligation is illegal by that particular law, though legal by another. The parties cannot be presumed to have contemplated a law which would defeat their engagements.'"

(**d.**) The mere fact that a clause of the contract, valid by the foreign law, would be opposed to the public policy of this country, if made with reference to our law, is not generally regarded as a ground for refusing to enforce the law the parties have adopted.

A clause adopting foreign law in connection with a negligence exemption was before Judge MORRIS in the *Ornamore*, 24 Fed. Rep., 922, 928, under a contract made in Baltimore for the shipment of cattle to Liverpool.

In dealing with that clause of the contract which called for the application of English law (p. 927), he held:

"The presumption is that the parties enter into a contract with reference to the law of the place where it is made, but this presumption is easily overthrown by circumstances which show that this was not the intention of the parties (*Whart. Confl. Laws*, 434).

"In *Cox* v. *U. S.*, 6 Pet., 203, it is said by the Supreme Court:

"'The law of the place where the contract is made is to govern in expounding and enforcing the contract, unless the parties have a view to its being executed elsewhere, in which case it is to be governed according to the law where it is to be executed.'

"The present question is not one which affects the capacity of the parties to make the contract. It is not a case in which, according to the American law, it could be said that there is no contract at all binding on the parties. It is merely a question of the extent and nature of the obligations and conditions of a contract. The law is thus stated in *Story Confl. Laws*, 242:

"'Generally speaking, the validity of a contract is to be decided by the law of the place where it is made, unless it is to be performed in another country, for, as we shall

presently see, in the latter case the law of the place of performance is to govern.'

"At page 280 he further said:

"'The rules already considered suppose the performance of the contract to be in the place where it is made, either expressly or by tacit implication. But where the contract is expressly or tacitly to be performed in any other place, there the general rule is, in conformity to the presumed intention of the parties, that the contract, as to its validity, nature, obligation and interpretation, is to be governed by the law of the place of performance.'

"And the author cites as clearly expressing the rule the statement of Lord Mansfield:

"'The law of the place can never be the rule where the transaction is entered into with an express view to the law of another country as the rule by which it is to be governed.'

"In *Whart. Confl. Laws*, 472, it is stated to be a rule fairly deducible from adjudged cases that where there are no other controlling circumstances, a contract of carriage is to be interpreted by the law of the carrier's principal office. In this case, although the contract was made in the United States, it was made in the port of Baltimore by a resident of Chicago with a British corporation for carriage in a British ship to a port in Great Britain, and the express agreement of the parties, deliberately made two months before the shipment, was that any question arising against the carrier under the contract or the bill of lading should be determined by the English law.

"Under all these circumstances, it seems to me the Court should give effect to the clause of the agreement. *It leaves the intention of the parties beyond doubt of any kind, and that intention was to give the provisions of the bill of lading such efficacy as the English Courts would give to them.* As I understand the facts of the case and the rulings of the English Courts upon similar bills of lading, I think the exceptions cover the injuries sustained by this libelant, and the libel must be dismissed."

This case was affirmed on appeal by Judge BOND, whose decision has not been reported.

(**e**.) In the present case there are peculiar reasons for enforcing the English law.

In the first place, a great majority of the claimants and of the interests before the Court are British. Both vessels are British; and in the answer of the insurance companies

to the Plymothian's petition it is shown that the Canton Insurance Company, Limited, the Triton Insurance Company, Limited, the Indemnity Mutual Marine Assurance Company, Limited, the Standard Marine Insurance Company, Limited, the British and Foreign Marine Insurance Company, Limited, and the London Assurance Corporation are all British corporations, and that the copartnership of C. T. Bowring & Co. are underwriters at Lloyds, England, and hence presumably English. The claims they proved amount to about $51,000.

The only American claimants are the Atlantic Mutual Insurance Company and the Insurance Company of North America; and, although the companies themselves are domestic, it appears from the answers that the losses they paid were to British subjects. The Atlantic Mutual Insurance Company avers that it "has established a claim in the amount of £693 10 British Sterling, equivalent to $3,374.91." The Insurance Company of North America avers that it "has established a claim of the amount of £3,531 British Sterling, equivalent to $17,183.61." The combined claims of these two companies amount to about $20,500. The claims of all the other claimants are also alleged in Sterling, showing conclusively that the persons in whose right these claims are put forward were all British, and hence that all the parties and both the vessels were British.

In the second place, the collision occurring between British vessels, there would be no inherent injustice in adjudging their mutual rights and liabilities according to the law of their own country.

This Court, in *The Scotland*, 105 U. S., 24, 29, said:

"But, if a collision occurs on the high seas, where the law of no particular State has exclusive force, but all are equal, any forum called upon to settle the rights of the parties would *prima facie* determine them by its own law, as presumptively expressing the rules of justice; but if the contesting vessels belonged to the same foreign nation, the Court would assume that they were subject to the law of their nation carried under their common flag, and would determine the controversy accordingly."

And in *The Belgenland* (114 U. S., 355, 370), it was said:

"Another qualification is that if the maritime law, as demonstrated by both nations to which the respective ships belong, be the same in both, in respect to any matter of liability or obligation, such law, if shown to the Court, should be followed in that matter, in respect to which they so agree, though it differ from the maritime law as understood in the country of the forum; for, as respects the parties concerned, it is the maritime law which they mutually acknowledge."

(f.) What is the objection to settling the questions which have now arisen, and are here in judgment, according to the law which the parties have deliberately chosen?

The point has not arisen before, as far as we can find, with reference to a pilot.

In some District Court cases it has been said that to permit carriers to exempt themselves from the results of their *servants'* negligence would be subversive of our public policy (*e. g.*, The *Iowa*, 50 Fed., 561; The *Energia*, 56 Fed., 124; The *Hugo*, 57 Fed., 403; *Lewisohn* v. *Natl. S. S. Co.*, 56 Fed., 602).

Such might indeed be the *effect*, but it is fallacious to argue that therefore such was the *design*. We have here a printed form of bill of lading. It does not refer to the *English* law *eo nomine*. If merchandise were shipped under it upon a Spanish, French or American vessel, the law of the flag would be the law to be applied. The clause embodies a principle of general application, and is not intended to prefer any particular law in general over any other law; it leaves everything to go by the laws of the ship's country. It is no ground for refusing to uphold such a provision that as applied to a particular instance it overrides our own law, unless the contract is illegal or intrinsically immoral.

Indeed, no sound reason is perceived for refusing to effectuate a preference distinctly expressed by the parties to a contract, for some other law than our own, if they think such law more equitable or just, or want it for other reasons, even though the Courts should think the

parties ought not to prefer it or want it. Especially is this so where all the parties in interest are subjects of the country whose law they adopt.

In *Van Remisdyk* v *Kane*, 1 Gallison, 371, 375, Judge Story, in dealing with a contract made in Java, stated the limitations upon the general principle as follows:

"The rule is well settled that the law of the place "where a contract is made is to govern as to the nature, "validity and construction of such contract; and that "being valid in such State, it is to be considered as "equally valid and to be enforced everywhere, *with the "exception of cases in which the contract is immoral or "unjust, or in which the enforcing it in a State will be "injurious to the rights, the interest or the convenience "of such State or its citizens.* This doctrine is explicitly "averred in *Huberus De Conflictu Legum*, 2 Tombe, lib. "1, tit. 3, and has become incorporated into the code of "national law in all civilized countries" (citing many authorities).

In his *Conflict of Laws*, Secs. 244, 245, 246, Judge Story deals with the limitations above suggested upon the general principle, and the only cases he found were: (1) contracts in fraud or evasion of the custom laws of the forum; (2) contracts for distribution of proceeds of prize, resulting from collusive capture and condemnation procured in our courts by enemies; (3) cases to recover the price of slaves sold abroad; to which a distinguished French writer, *Foelix*, 1 *Droit International Privé*, 236, adds another category, namely (4), cases of gambling contracts, and those relating to lotteries.

Plainly our policy regarding negligence clauses falls within none of these classes.

In Hon. David Dudley Field's *Outlines of an International Code*, Articles 602, 603, the rule upon this matter was proposed as follows:

"602. Subject to Articles 604 and 605, a contract made "within the jurisdiction of one nation, and agreed ex-"pressly or tacitly to be performed either wholly or "partly within the jurisdiction of another, is governed "as to its validity by the law of the place where it is

" made; and as to its interpretation, by the law actually " or presumptively intended by the parties for that pur- " pose, as provided in the next article.

" 603. The law intended by the parties to govern the " interpretations of any stipulation of their contract is " deemed to be:

" 1. The law of any nation named by them as part of " their contract; or

" 2. *If no such law is so named*, the law of the place " which such stipulation is agreed to be wholly performed; " or

" 3. If no such law or place of performance is specified, " the law of the place of the making of their contract; " but in this case a contrary intention may be shown."

Articles 604 and 605 proposed to except from the operation of these rules the cases only (1) a contract forbidden by an *express* provision of law, or (2) which is unlawful everywhere in civilized countries, or (3) is made with intent to violate an *express* provision of this Code or of the laws of any nation a party to the Code.

It was never suggested in the proceedings of the Society for the Codification of the Law of Nations that these sections proposed any innovations upon the generally received rule, or narrowed the exceptions where the rule is not followed.

FOELIX states the general rule as practised in countries following the Civil Law (1 *Droit International Privé*, p. 223) as follows:

" Le principe général en cette matiére est que les parties " contractantes ont eu l'intention de se conformer, dans " leur conventions à la loi du lieu où celles-ci ont été " consenties et sont devenues parfaites, et par suit de les " soumettre à cette loi; en d' autres termes, que la valeur " intrinsèque, la substance, le lien, *vinculum juris*, des " conventions depend de la loi du lieu où elles ont recru " leur perfection; l'acte valable où nul d'aprè cette loi " le sera également partout " * * *

" Lorsque les contractants *n' ont pas, expressément* " *adopté* la loi de lie où le contrat a été passé alors com- " mence les presomptions " (p. 225).

" Lorsque le divers contractants n'ont pas la même pat- " rie le même domicile, on ne saurait donner la préférence " aux lois de la patrie où du domicile de l'un d'eux ni juger " sur l'intention que l'un d'eux pretendrait avoir eue de

" se rapporter aux lois et usages de sa patrie; car il est " de l'essence de toute convention qu'il y ait consentement " commun des parties sur tout ce que compose le contrat. " Dès lors on a dû admettre que leur volonté s'en rap- " portée à une loi commune et par un accord à peu près " unanime, les auteurs et les tribunaux ont admis en " principe qu'il faut s'arrêter à la loi du lieu où le contrat " a été passé " (p. 228).

To this effect *Story, Conflict of Laws*, Sections 239, 240, 241, 242.

FOELIX states the exception thus: " Lorsque le contrat est contraire aux bonnes moeurs ou aux institutions ou prohibitions existant dans le pays où il doit recevoir son exécution ou lorsqu, il porte prejudice soit aux intérêts d'une nation, soit aux droits acquis par les citoyens de cette nation " (p. 235).

It is noteworthy that he does not include public policy within the exception.

(**g**.) A State Court, called upon to administer the law of another State or of a foreign State or of a foreign country, could refuse to do so, upon the grounds which would justify this Court in a similar refusal, yet in practice they do not regard the public policy of their own State as a sufficient ground for applying their own law, instead of the foreign law, where the latter would otherwise be applicable (*Fonseca* v. *Cunard S. S. Co.*, 153 Mass., 553; *Forepaugh* v. *D. L. & W. Ry.*, 128 Penn. State, 217, and cases there cited; *Brown* v. *Browning*, 15 R. I., 422; *Gross* v. *Jordan*, 83 Maine, 380; *Dugan* v. *Lewis*, 79, Texas, 246).

(**h**.) The contract here in question is not opposed to any public policy prevailing at the present time. The third section of the act of Congress entitled " An Act relating to Navigation, Bills of Lading," &c., approved February 13, 1893, provides:

" That if the owner of any vessel transporting mer- " chandise or property to or from any port in the United

" States of America, shall exercise due negligence to make " the vessel in all respects seaworthy and properly manned, " equipped and supplied, *neither the vessel or owner, or* " *owners*, agents or charterers, *shall become or be held re-* " *sponsible for damage or loss resulting from faults or* " *errors of navigation or in the management of said ves-* " *sel.*"

If that statute were the law for the present case, and the Court should reach the conclusion that the loss arose from negligence in navigation, then so far from an exemption against such damage being contrary to our public policy, the specific loss would fall within an exemption provided by national legislation (the *Silvia*, 64 Fed., 607; the *Elona*, 64 Fed., 880). In the *Silvia*, on appeal to the Circuit Court of Appeals (68 Fed., 230), WALLACE, *Circuit Judge*, in affirming the decree below, said:

" Read as a whole, the purpose of the act manifestly is, " on the one hand, in the interests of the public to prevent " carriers from evading responsibility to exercise due dili- " gence in providing sea for vessels, and in the handling " and care of the cargo; and on the other hand, whenever " they have exercised due diligence in these respects, to " absolve them from liability for loss arising during the " transit, from the perils of the sea and from faults or " errors in the navigation or management of vessels."

It is noticeable that none of the cases under the law as it stood before the Act of 1893, dealt with an exception from liability for faults or errors in navigation by a *pilot* The language of the statute is most apt to include such negligence and to relieve the shipowner from it. While that act has no direct bearing on the present controversy, it may be looked at as a legislative view of public policy, and as showing the futility and substantial injustice of adding to the few exceptions to the great rule that the chosen law of the contract should be applied, a principle of such slight consequence that it is subject to be changed by legislative enactment from time to time, even between the occurrence of accidents and the trial of cases growing out of them, in the ultimate Court of Appeal.

VII.

If any fault be found on the part of Plymothian, not covered by the bills of lading, it was slight as compared with the faults of the Victory, and the Court should therefore apportion the damages in accordance with the degree of the faults.

1. *The form of the decree entered by the Circuit Court of Appeals was erroneous, whatever rule of division may be adopted.*

On the finding that the Victory was in fault, and that both Plymothian and the cargo had suffered damages by it, and both had duly proved their claims, it became the duty of the Court, under Rule 55, to order the amount of the Victory's bond and interest to be paid into Court, and to decree that—

"The moneys be divided *pro rata* amongst the several claimants in proportion to the amount of their respective claims duly proved and confirmed as aforesaid."

As the liens for the cargo damage and Plymothian's damage, or a balance thereof, were of equal rank (*Norwich* v. *Wright*, 13 Wal., 104, 122), the decree should have been in accordance with the rule.

If the Court found both to blame, but in unequal degrees, the degrees should have been stated—as, for example, four-fifths and one-fifth; and Plymothian should have had a decree against the Victory's bond for her recovery on this basis *pro rata* with the cargo, with a proviso that she make up the cargo's deficiency, if any, not exceeding her limitation value.

2. *The Court may divide the damages in any proportion it thinks proper.*

(**a**.) The usual rule heretofore followed in this Court has undoubtedly been to divide ship damage equally between

two offending vessels (The *Max Morris*, 137 U. S., 1, 9). But the question whether the Court was bound so to divide them does not appear to have been specifically passed upon. Even in the countries where the rule is to apportion them in accordance with the degrees of fault, it seems that they are more frequently halved than divided in other proportions; and it may be that no such disparity in the faults has existed in the cases previously decided as to call for an express decision on the point.

It is noticed, however, that in Mr. Justice WOODBURY's opinion in *Waring* v. *Clark*, 5 Howard, 441, 503, he says:

"If both vessels were in fault the damage is to be divided *either* equally between them (3 Hagg Ad., 328, note; 4 A. & E., 431; 9 C. & P., 613; Reeves *v.* The *Constitution*, Gilpin, 579), or *they are to be apportioned in some other more appropriate ratio, looking critically to all the facts* (Woodrop Sims, 2 Dodd., 85; 3 Scott N. R., 336; 3 M. & G., 59; Curtis' Admiralty, 145, note)."

And in the case of the *Max Morris*, 137 U. S., 1, 15, Mr. Justice BLATCHFORD, in delivering the opinion, said:

"Whether in a case like this" [both to blame] "the decree should be for exactly one-half of the damages sustained, or might, in the discretion of the Court, be for a greater or less proportion of such damages, is a question not presented for our determination upon this record, and we express no opinion upon it."

(**b**.) It is noteworthy also that under the operation of the Limited Liability Acts one vessel has frequently been adjudged to bear a greater amount of damages than the other, where both are to blame, a case that frequently arises where the interests of a third vessel or its cargo are involved.

The North Star, 106 U. S., 17.
The Alabama and The Gamecock, 92 U. S., 695.
The Hartford and *The Unit*, 97 U. S., 323.
The Sterling and *The Equator*, 106 U. S., 647.
The *Washington* and The *Gregory*, 9 Wal., 513, 516.

In the *Mary Ida*, 20 Fed., 741, 747, BRUCE, *J.*, divided the damages in the proportion of three-fourths and one-fourth, on a finding of desparity in faults.

(**c**.) In personal injury cases, of which *The Explorer*, 20 Fed. Rep., 135; *The Wanderer*, 20 Fed. Rep., 140, and the Max Morris, *supra*, 24 Fed. Rep., 860; 137 U. S., 1, are examples, no effort has been made to determine the exact damages, and then, on a finding of mutual fault, to award the libelant an exact half. Indeed, the damages appear to be worked out rather on the theory of awarding to the libelant a sum which, under all the circumstances, taking account of the gravity of his fault as compared with that of the vessel, seems fair.

As stated in *The Max Morris*, 24 Fed. Rep., at page 864, the rule is "to give or withhold damages according to principles of justice and equity, considering all the circumstances of the case, not as full compensation for the injury, but as required by decency and humanity from a party without whose fault there would have been no injury;" to hold vessels liable to pay "*some part* of the actual pecuniary loss where their fault is clear, provided that the libelant's fault, though evident, is neither willful, nor gross, nor inexcusable."

The conclusion of BROWN, *J.*, page 64, was stated by him as follows:

"This is a case sufficiently strong, as it seems to me, to require the claimants to bear some part of the damage that their concurrent negligence occasioned. Following the precedent of *The Explorer*, *supra*, I shall charge to the libelant's own fault all his pain and suffering and all mere consequential damages, and charge the vessel with his wages at the rate of two dollars per day for seventy-five working days, making $150, for which sum a decree may be entered, with costs."

This language was in substance re-stated and adopted in the decision of this Court (137 U. S., at p. 14).

The question whether the damages should be divided equally or unequally is open under the prayer for general relief (The *Gazelle*, 128 U. S., 474).

(**d**.) The history of the rule by which damages were divided is involved in some obscurity. (*Marsden, Collisions*, 3d ed., p. 145) It seems at first to have been applied in cases of inscrutable fault; and was not applied in any court in England in a case of mutual fault until the case of *The Petersfield* and *Judith Randolph*, decided by Sir James Marriott, Judge of the Admiralty Court, May 20, 1789 (Marsden, p. 151). The rule for such cases was not announced in the House of Lords until 1854 in the case of *Hay v Le Neve*, 2 Shaw's Scotch Appeal Cases, 395. In that case the judgment below had apportioned the damages two-thirds upon one vessel and one-third upon the other, but in the House of Lords it was held they should be divided half and half.

Starting from the same beginnings (Judgments of Oleron, 2 Black Book of Admiralty, 379; the Rolle of Olayron, do, 449; the Judgments of the Sea, 3 do, 21; the Gotland Sea Laws, 4 do, 87; and the Laws of Wisbuy, 4 do, 283), totally different rules have been worked out in the practices prevailing on the continent of Europe. Three different rules are there followed, where both vessels are found in fault:

(**1**.) To leave the loss where it falls. This is the rule in Holland, Italy, Spain and those of the South American States which have derived their law from Spain. It was also formerly the rule in Germany, but the proportional rule has been adopted in the new German civil code. (13 L. Q. R., 34).

(**2**.) To divide the loss proportionately to the value of the vessels in collision. This is a kind of general average principle obtaining in Turkey and Egypt.

(**3**.) To divide the loss proportionately to the faults of the two vessels. This is the rule of France, Belgium, Germany, Norway, Sweden, Denmark, Portugal, Greece and Roumania.

"*Both to Blame*," by Dr. Raikes (London). (In appendix to this brief).

"*Collisions at Sea in Relation to International*

Maritime Law," by Louis Franck (Antwerp), 12 Law Quarterly Review, 260.

"*Collisions at Sea where Both Ships are in Fault*," by Leslie F. Scott (Liverpool), 13 Law Quarterly Review, 17.

These three papers deal fully with the whole subject, and will be found of great interest.

(**e**) As an abstract principle, the rule apportioning damages proportionately to the blame would appear to be the most just and equitable that could be adopted. The reasons which have led the English courts and this Court to depart from the common-law rule in cases of contributory negligence logically lead to the adoption of the proportionate rule. As M. Franck very well says (12 L. Q. R., 262):

"If a pair of scales is the emblem of maritime justice in England, they are strange scales, in which the slightest neglect—*minima culpa*—weighs as many pounds sterling as the grossest misconduct. The English rule is then unjust. But it is also illogical. It is intelligible that the law should take away all right of recovery when there is common fault; but it is impossible to understand why a law which recognizes the principle of dividing the liability should decide that in every case the division should be by halves. That is purely arbitrary. Either the principle of division is just, and then it should be complete—that is, proportional—or it is unjust, and there should be no division—by halves any more than by quarters. But not only is the rule unfair and illogical, it is also born of an historical mistake. The practice had its origin in a mediæval rule which applied to cases of inscrutable negligence, and not at all to cases where the faults are ascertainable."

(**f**) What are the objections to be urged against the adoption of the proportionate rule in this Court?

(**1**.) The difficulty of making quantitative distinctions in the degrees of blame.

At the first blush, the task of apportioning the blame between two or a larger number of vessels may appear to be a matter of difficulty. How is a judge to tell, it may

be urged, whether the fault of one is twice, or thrice, or five times as great as that of another, or of several others? The answer is that in the practical operation of the proportionate rule the damages are divided in equal parts unless the fault of the different vessels is clearly disproportionate. The fact that the fault frequently is disproportionate is within the experience of all persons concerned with such matters.

It is pointed out in the papers above referred to that where the damages are not halved the proportions are generally thirds, fourths or fifths; and that the quantitative distinctions are worked out on common sense principles, and not by algebra. Thus, in cases of crossing ships, where a vessel bound to hold on gives way a little too soon, the damages would be apportioned four-fifths against the chief wrongdoer and one-fifth against the one that displayed weak nerve. So also in cases of steam vessel meeting sail vessel, where the sail vessel, being close pressed, changes her course, and thus contributes to a collision which could have been narrowly avoided had she held on. So also where the fault of one has imposed upon another the duty to stop and reverse, and that duty is delayed too long (12 L. Q. R., 265, 269).

(2.) The risk of appeals.

It may be thought that the vesting of so much discretion in courts of first instance would lead to frequent appeals in the hope of obtaining the exercise of a different discretion on the part of appellate courts as to the differing degrees of fault.

It is pointed out by Mr. Scott (p. 29) that: "Under the present rule of dividing the loss the Court is concerned solely with ascertaining the *quality* of the conduct of each ship—that is, whether two ships are respectively to blame, and is not concerned with the *quantity* of the blame—that is, to inquire how much each ship is to blame, or whether one ship is more to blame than the other. * * * But once admit the proportional rule and the question before the Court must be regarded in an additional light. When the Court has decided upon the evidence that each ship has broken one or more regulations, and is, therefore, to blame, it will

proceed to weigh quantitatively the facts so found, and to say whether one ship is more to blame than the other, and, if so, how much more. The Court, in thus weighing the various breaches of regulations, or other acts of negligence, already proved to its satisfaction, performs an operation which our rule of dividing the loss never requires; and it is in this particular that appeals under the proportional rule will differ from appeals under the present rule. Now, this process, which will distinguish the decision of a case under the proportional rule, is in its nature an estimate made by the Court, in the use of its discretion, of a question of fact, and is analogous to the quantitative estimate of the services of salvors—also a question of fact—which, when the quality of the services has been determined and the right to salvage remuneration, established, the Court proceeds to make in every salvage case; and as appeals from this quantitative estimate, made in the discretion of the Court, of the value of the salvage services are discouraged by the Court of Appeal, so, it is submitted, will appeals be discouraged from the quantitative estimate of the blame, which takes the form of an apportionment under the proportional rule."

M. Franck (p. 270) gives his own testimony, and (pp. 274, 278) the testimony of distinguished French advocates, that the proportional division of damages does not give rise to more appeals than would be expected where the damages are divided equally. It is also intimated that the appeals are not generally against the proportion of the division, but are on the question of liability of one or the other of the vessels for any share of the loss.

(**g**.) The difficulties of dealing with claims of cargo, where two ships are to blame, are no greater than under the rule now obtaining in this Court.

In France, Belgium, Germany, Greece, Italy, Spain, the cargo is entitled to recover its whole damages from either ship, leaving them to settle their differences *inter se* on the principle of apportionment of blame decreed by

the Court (Raikes, pp. 7, 11). But the liability of each is limited to the value of ship and freight. The form of the decree in such cases, where both vessels are before the Court, is, unfortunately, not dealt with in either of the articles above referred to. It is pointed out, however, that in Belgium (Raikes, p. 7), France (do., p. 9), Germany (do., p. 9), Greece (do., p. 10), Holland (do., p. 10), and Italy (do., p. 11), provisions in bills of lading exempting the shipowner from damages arising from the negligence of his servants are valid, and that where such clauses are before the Court, the liability of the carrying vessel is cut off.

(**h.**) The fairness and justness of the proportionate rule is found not only in the sanction given to it by the courts in principal maritime countries of Europe, but also in the commercial congresses and meetings of different societies organized to reform and harmonize maritime laws in different countries. It is not to be doubted that the trend of modern opinion is clearly in favor of this rule, not only on the continent, but in England (12 L. Q. R., 271).

If in the present case, notwithstanding the arguments addressed to the Court in her behalf, both upon the merits and upon the effect of the exemptions contained in the bills of lading, the *Plymothian* be found in any fault, it must be a slight one, "an act of omission," as the Court of Appeals said, and one which should not result in the imposition of half damages. On the findings of the Court of Appeals, not more than a fifth of the damages, if that much, should have been imposed upon her as between the vessels; as to her four-fifths she should have recovered against the *Victory's* bond *pro rata* with the cargo, submitting to a judgment for deficiency not in excess of her stipulated value. No part of her *pro rata* recovery against the *Victory's* bond should be awarded to the cargo in any event. The amount of such recovery stands in the same category with insurance moneys, which, it has been decided in this court, the shipowner may retain (*City of Norwich*, 118 U. S., 468; Butler *v.* Boston SS. Co., 130 U. S., 527, 558).

Last Point.

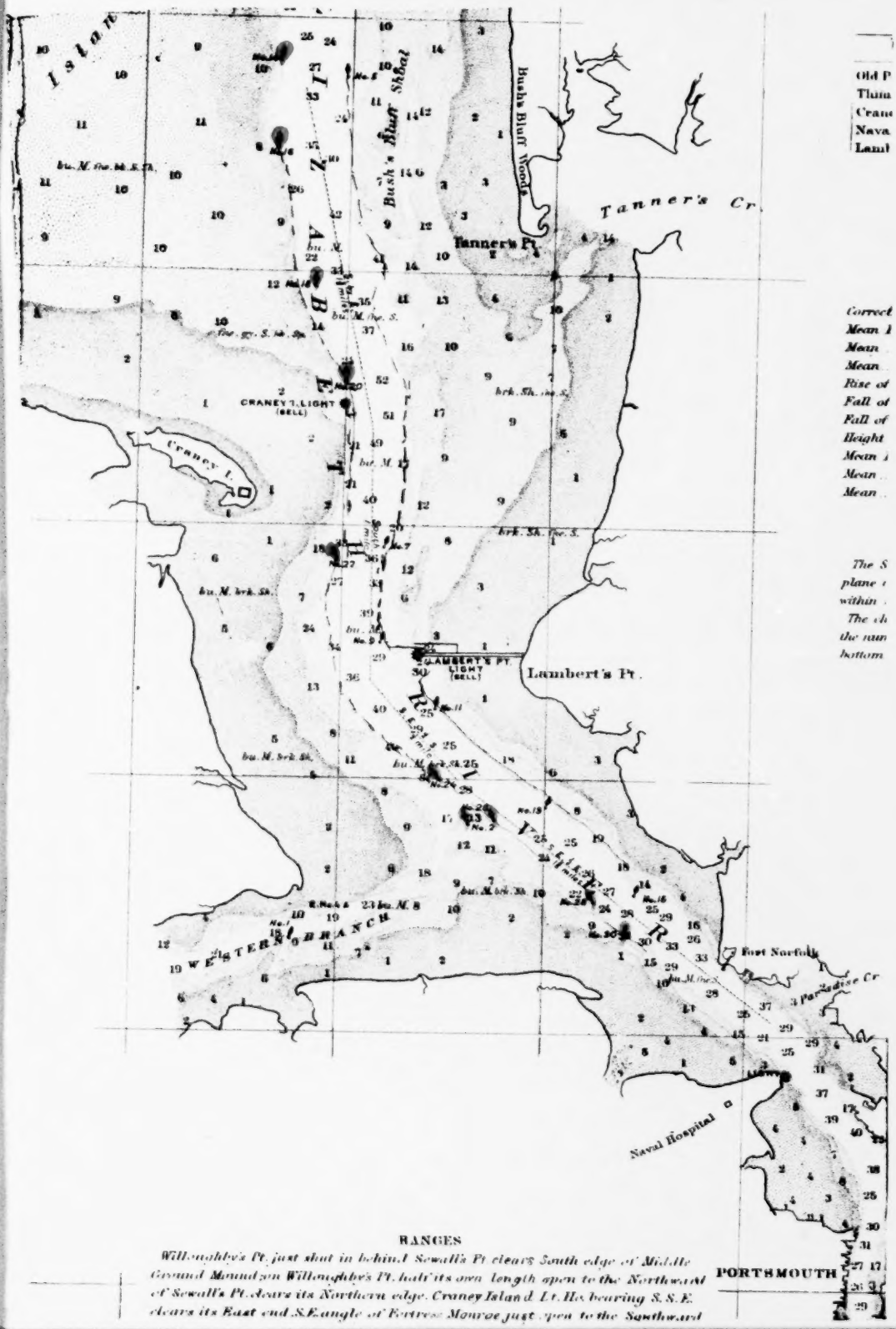
The decree of the Court of Appeals should be reversed, and the Plymothian absolved from all liability either to the Victory or to the underwriters on cargo; but if such a decree be not entered, then only the smallest amount of damages consistent with the equities of the case should be adjudged against her.

NEW YORK, October 25, 1897.

Respectfully submitted,

WHITEHURST & HUGHES,
CONVERS & KIRLIN,
Proctors for Plymothian.

J. PARKER KIRLIN,
Of Counsel.



RANGES

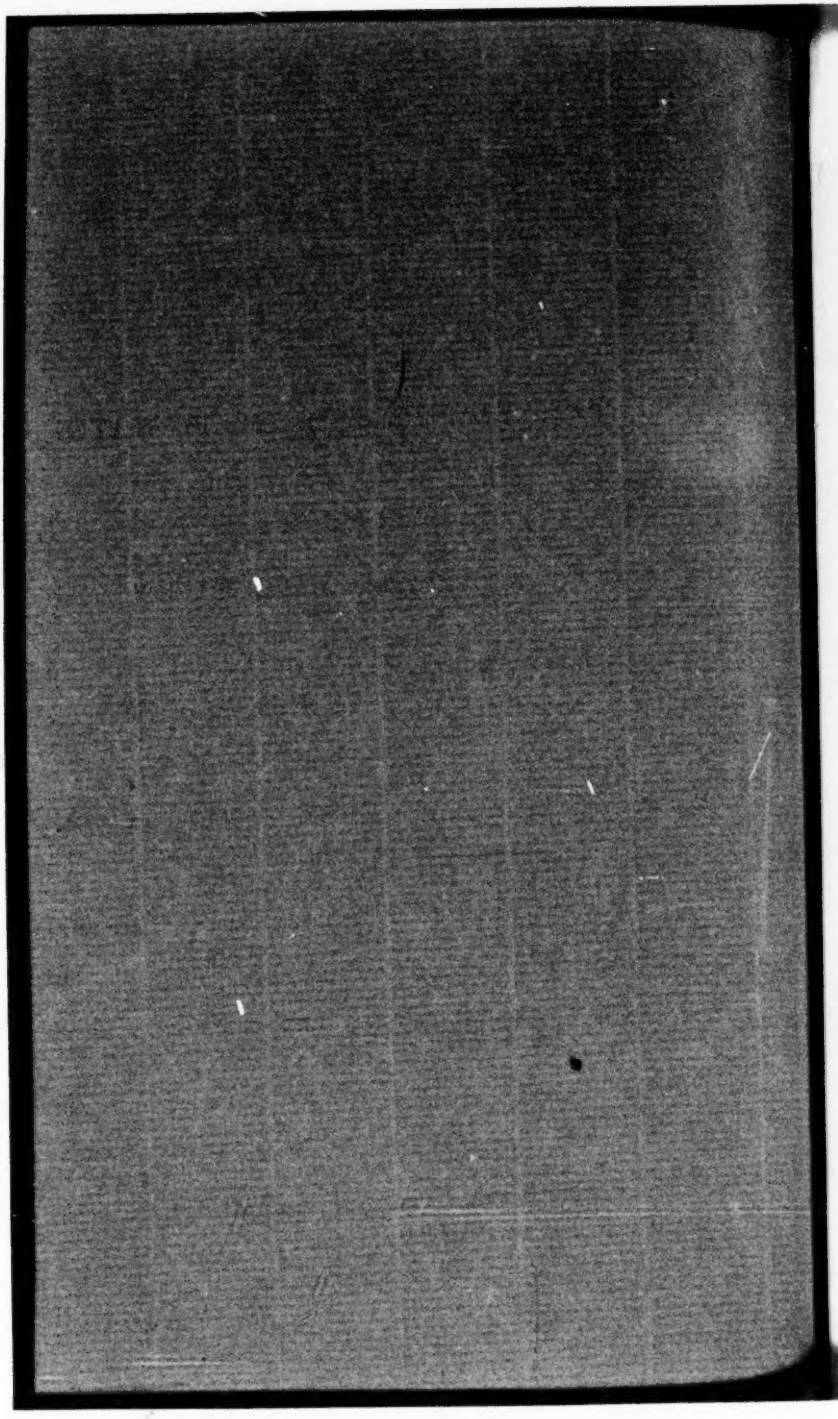
Willoughby's Pt. just shut in behind Sewall's Pt clears South edge of Middle Ground Mound on Willoughby's Pt. half its own length open to the Northward of Sewall's Pt. clears its Northern edge. Craney Island Lt. Hs bearing S.S.E. clears its East end S.E. angle of Fortress Monroe just open to the Southward

APPENDIX TO MR. KIRKLAND'S BRIEF

I. The Original Appointment of Captain De Hart's Company to "Duty as Rangers"

II. Letter on the Case of Capt. Richardson and the Honors in Regular Corps of Army

III. Diagram based on Portion's Exhibit X



"BOTH TO BLAME."

A PAPER

ON THE CONFLICT OF LAW WHERE TWO VESSELS ARE HELD JOINTLY IN FAULT FOR A COLLISION. READ BEFORE THE CONFERENCE OF THE ASSOCIATION FOR THE REFORM AND CODIFICATION OF THE LAW OF NATIONS,

AT BRUSSELS ON THE 3rd OCTOBER, 1895.

BY

F. W. RAIKES, Q.C., LL.D.

PRINTED AND PUBLISHED BY
PEWTRESS & Co., 28, LITTLE QUEEN STREET, LONDON, W.C.

"BOTH TO BLAME."

"MISERA EST SERVITUS UBI JUS EST VAGUM AUT INCERTUM."

SOME fifteen years ago I adopted this legal maxim as the motto for a thesis read for my Doctor's degree before the University of Cambridge. That thesis had for its subject the general state of the Law in regard to collisions at sea, but great as are the differences in that Law, in no branch of it are they greater than in that where "both vessels—using the instrument for the person—are to blame."

Cases of differences in the Law of different States in matters connected with their own affairs on shore are of comparatively small importance; it would doubtless be convenient if a knowledge of the Law of one State of necessity, from uniformity of Law, carried with it a knowledge of the Law of all States, but yet anyone disobeying the Law of the State knows, or is supposed to know, the Law by which he will be judged. Not so at sea. Vessels under, it may be, the same flag or under different flags, come into collision, and being damaged, seek ports of refuge. In those ports they may, and very probably will, find a Law in force, both as to the liability for the collision and the amount of such liability, different from that of their own flags, and very possibly if the two vessels reach different ports, say, on the two sides of the North Sea or Channel, each will find itself amenable to a different Law.

Considering the enormous value of the shipping of the world on the one hand, and the endless international complications likely to arise in consequence of such divergences, it would appear that here at all events there is reason for international agreement. Other important questions of Maritime Law which have from time to time engaged the attention of this Association, such as Bills of Lading, and General Average, are after all matters of contract as to which the contracting-parties may, without injustice at all events, be left to make their bargains. In the case of collisions on the neutral territory of the sea there is no such possibility, and

it is surely time that as an uniform practice as to the Rule of the Road has been agreed to by all civilized States, it should be followed by an uniform liability for infractions of that Rule.

It is not my purpose to attempt to say what that uniform Law should be. I do not propose to advocate the *judicium rusticorum*, as with singular infelicity of expression for a Maritime matter the Law as to incidence of damages where both ships are to blame, administered in my own country and generally in the United States, is called, nor to denounce that of the damage, be it great or small, resting where it falls, as in Germany or Holland, nor to express any undue admiration for the logical accuracy of apportioning the liability to the fault, as practised in France, and first enacted as substantive Law in the admirable revised code of the State in which we are guests, nor to do more than draw attention to the peculiar provision of the Turkish and Egyptian Codes, which treats the matter as a species of General Average, and makes the joint damage a *pro ratâ* charge on the value of both ships.

I think in reading a paper before persons of many nations interested in the administration of Law and Justice, it is better to confine oneself to pointing out the anomalies existing, and leave it to the consensus of enlightened jurists and statesmen to decide which of the conflicting systems, or what combination of them, is most in accord with the principles of natural justice, most easily administered, and most likely to be loyally accepted by the Maritime States.

Within the limits of a paper it is not possible to deal with all *minutiæ* of a subject of this magnitude. I propose only to point out what, so far as I have been able to ascertain, is the Law and practice of different States where both ships are to blame :—

(1.) As regards damages sustained by the ships themselves.

(2.) As regards damages sustained by cargo on board the ships.

(3.) As regards claims by relatives for loss of life, or by passengers and crews for personal injuries.

(4.) What, if any, limit there is of liability.

(I.) As already observed we find three leading systems of assessing the damages :—

(*a*.) That of throwing upon the Court which tries the case the onus of apportioning the blame between the two vessels and dividing the gross damage in the like

proportion. This principle is followed in *Belgium*, under Art. 229 of the Code of 1880, and was the practice prior to the enactment of the Code (the *Damia* and the *Alster*, decided in 1880, before the Code came into operation). In *France*, the Code contains no express provision, and apparently even since the Code of Commerce came into operation the practice was that each should bear its own loss, so, at least, it is stated by Pardessus (Cours de Dr. Com., Tarlier, Vol. I., Pt. iv., Tit. II., Sec. iv.), but of late the practice has been to apportion the damage according to the amount of blame, and this practice was expressly approved by the Cour de Cassation, at Paris, in 1881, in the case of the *Rance* and the *Despatch*. M. Autran (*L'Abordage Maritime*, p. 120) states this to be in accordance with the general principles of French Law where two parties are jointly in fault.

The Commercial Code of *Greece* being practically identical with that of France and French authorities as to its interpretation being accepted in that country, it may safely be presumed that the same results would follow, but I have not come across any case of both to blame decided by the Areopagus.

Portugal has by her new Code, 1890, Art. 666, adopted the same principle. Under the former Code in case of both to blame, the damage rested where it fell; in other words, each ship paid her own damages.

The *Scandinavian States* (*Norway*, *Sweden*, and *Denmark*), by their new Codes, identical in this respect, leave the apportionment of damages (Art. 220) in the discretion of the Court, which, on principles of natural justice, would appear to be a direction to decide in accordance with the principle above stated where the Court can apportion the blame.

The *Roumanian* flag has recently been seen in or near these waters, and, therefore, a word should be given to her Law. It is verbally identical with that of France, and, therefore, so far as the Code is concerned leaves the matter at large. The practice would probably also be that of France.

(*b.*) The next division, in cases of "both to blame," decides that in such cases the damage should rest where it falls, or, in other words, that neither party should recover

from the other any portion of the damage occasioned by an accident for which both were in some degree responsible.

This principle was in force in Great Britain until 1875, in those cases where the action was instituted in the ordinary Civil Tribunals, administering the Common Law as distinguished from Courts of Admiralty administering what was considered to be the Maritime Law. This strange anomaly, that a different result as to damages should arise from the same facts according to the Court in which the action was brought, was put an end to in that year by the Judicature Act, which effected many most important changes in the administration of the Law; and now, in no collision case between two ships where both are to blame, does the rule apply. In those of the United States of North America, however, which have taken their Law from Great Britain as their Mother Country, the anomaly still exists in theory; but from the larger jurisdiction, always accorded to Courts of Admiralty by the Constitution, the difficulty has seldom any practical effect. Germany (Art. 787), Holland (Art. 535) and Italy (Art. 662) adopt the principle, the Law of Italy having been altered under the new Code in this respect. In Russia, the Code makes special provision as to the incidence of damage in numerous special cases, as of ships fouling one another when at anchor, &c., but it appears that in the ordinary case of a collision at sea it also adopts the principle, and so under its new Code does Spain (Art. 827), the earlier Code having made no special provision on the subject. The Argentine Confederation (Art. 1,263), Uruguay (Art. 1,434), Chili (1,130), Venezuela (634), take the same view. Mexico and Peru follow the Spanish law in force prior to the new Code, which contained no special provision for "both to blame," but it appears that following the former practice in Spain, unless one ship could be shown to be wholly in fault, the matter was treated as a pure accident, and as in that case each would bear his own loss, these States also would arrive at the same result though by a different route. In the Austrian ports on the Adriatic, so far as I have been able to ascertain, some years ago the rules of the Italian

Code of Commerce, then in force, were followed by the Courts in Maritime matters, as regulating the general practice of seamen and shipowners in those waters. I am not aware whether the new Code, which, as already pointed out, has altered the Law of "both to blame" in Italy is now followed, or whether the former practice is still adhered to, if it is, the case will follow (I. (*a*.)).*

(*c*.) The remaining division in which, where both are to blame, the gross damage is equally divided between the two ships, is now, so far as I have been able to ascertain, practised only by Great Britain and her Admiralty Courts in her Colonies, and by the Admiralty Courts in the United States, but probably from the very large shipping interests of these two States more actual cases of collision, where both ships are to blame, are decided under this rule than under either of the others mentioned, possibly more than under both put together.

(*d*.) There is a fourth method enacted by the Codes of Turkey and Egypt and administered in the latter State by the International and Native Tribunals, by which the whole damage is massed together and divided, as a sort of General Average, between the respective values of the two ships (Art. 249 Turkey, Art. 242 Egypt). In Turkey, however, where there are Consular Tribunals each administers the Law of its own State.

It is worthy of remark that in the last 15 years of the Maritime States of Europe alone, Belgium, Italy, Portugal, Spain, Denmark, Sweden and Norway, have all legislated on the subject, and of these States Italy and Portugal have altogether changed their previous Law, though in opposite directions, Italy having gone from class (*a*) to (*b*), Portugal from (*b*) to (*a*).

(II.) Passing now to the case of cargo :

The matter becomes even more complicated and confusing, as we have to consider the rights of the cargo upon each ship to compensation from either or both of the vessels, and it may be that the cargo can recover (α) nothing from either; (β) all its damages from the carrying ship; (γ) all its damages from the other ship; (δ) half its damages

* At the sitting of the Conference I was informed by a member that now the German Code is followed in this matter by Austria-Hungary.

from the other ship with or without a claim for the residue against the carrying ship; (ε) the whole, jointly and severally, against both ships.

The matter is still further complicated from the right against the other ship being in tort or *ex delicto* or *quasi delicto*, and against the carrying ship in contract or *ex contractu*, in which latter case, whilst most States now recognise the right of the shipowner to contract himself out of his liability in this respect, some hold such contracts to be against public policy and therefore void.

In this complication it will perhaps be best to treat the Law of each State in alphabetical order instead of attempting to classify them. I regret, however, that this method compels me to commence with a confession of ignorance, as I do not know, doubtless some of those here present can inform us, what is the Law of Austria-Hungary* on the point, and to go on in extreme trepidation that I may make some presumptuous error in stating here what I understand the Law of Belgium to be.

As I understand it, here in Belgium, innocent owners of cargo which is damaged in a collision for which both ships are to blame, can recover the whole of their damage from either ship separately or from both jointly, leaving the ships to settle their differences, *inter se*, on the principle of apportionment of blame decreed by the Court (I. (*a.*) *ante*) (*The Valdemar* and *The Adriana*, C. of A., Brussels, 13.2.89, 5 R.I.D.M. 97), but as an exception in the Bill of Lading of liability for the negligence of the shipowners' servants is valid (*Cork S.S. Co.* v. *Gossen & Cie.*, C.C., 1 R.I.D.M. 390; *Bartlett* v. *Michaelsens*, C.A., Brussels, 2 R.I.D.M. 582), the remedy against the carrying ship may be lost by the terms of the contract, and the cargo-owner may in practice be left to a claim for the whole against the other ship.†

In *France*, M. Autran (*L'Abordage Maritime*, pp. 120, 121), states the Law to be to the same effect as in Belgium, and since the publication of his book, two important decisions of the

* See foot-note on preceding page.

† Belgian advocates present at the Conference agreed that it had not been judicially decided whether a ship which had paid the whole claim could recover a proportion of it against the carrying ship, *non obstante* the Bill of Lading, but seemed to entertain the opinion that it could not. A very recent decision of the Tribunal of Commerce at Antwerp has held that where there is an exception from liability in Bills of Lading, expenses incurred by a ship in a port of refuge after a collision for which both ships are to blame are treated as general average between ship and cargo (11 R.I.D.M. 123).

Court of Cassation in Paris have endorsed his view (*The Durley* and *The Sirius*, C.C., Chambre Civil, 1.7.92, 8 R.I.D.M. 6; *The Charles Quint* and *The Ville de Brest*, C.C., Ch., Civ., 11.7.92, 8 R.I.D.M. 258). It may also be considered now as settled Law in France that a shipowner may exempt himself from liability for the negligence of his captain and crew, though until quite recently this was in great doubt, the Court at Bordeaux especially having for a long time held, notwithstanding strong indications of opinion, if not actual decisions of the Cour de Cassation, that such an exception was contrary to public policy and void.

In *Germany*, the cargo has a right to be paid the whole of its damage by either ship (*Hamburg Com.*, VI., 2,787, 1 R.I.D.M. 191), but here also the owner of the carrying ship may exempt himself from liability for the acts of his servants. There is this peculiarity in the Law, however, that, in collisions at sea, it is immaterial whether a ship is demised; that is to say, let on the terms that the crew are the servants of the hirer or not. The action for collision is against the owners of the ship, and not against the charterers whose servants occasioned the damage (*Co. Hamb., Sud Amer.* v. *Taylor Cameron, Trib. Sup. Hans.*, 14 J.D.I.P. 632, 16 J.D.I.P. 859).

In *Great Britain*, the cargo, so far as its rights against the other or colliding ship are concerned, is so far identified with the ship which is carrying it, that where both vessels are to blame for the collision, it can only recover half its damages against the other vessel for the tort (*The Milan*, Lush, 358). As regards its rights against the carrying ship, it can recover the whole on the contract (*The Bushire*, 5 Asp.), or if it has already recovered half from the other vessel, then, the residue of its claim. The owners of the carrying ship may, however, contract themselves out of all liability for the negligence of their servants on board that ship, in which case the cargo can only recover half its damage from the colliding ship, and this principle holds good even in the case where both ships belonged to the same owners who had protected themselves as far as they could against liability for the acts of their servants (*Chartered Merc. B. of India, &c.* v. *Netherlands St. Nav. Co.*, 10 Q.B.D. 521). Damages paid to cargo cannot be brought into account in settlement between the two ships, except so far as they may affect the total damage payable under the Limitation of Liability Laws, the effect of which will be noted hereafter.

In *Greece* the Law is the same as in France, and, indeed, it was decided by the Areopagus that clauses in a Bill of Lading, exempting the owners from liability for the acts of the servants, were valid prior to this matter being decided in the same sense in France (3 R.I.D.M. 491).

In *Holland*, I believe, the cargo is considered to be so identified with the ship, that in case of both to blame it falls under the same rule (I. (*b.*)) and has to bear its own loss. It is true the cargo-owner has a claim against the captain, who again has a claim over against the actual wrong-doer, probably the officer of the watch, but from the somewhat limited resources of captain and officers this remedy is likely to be not well worth prosecuting. It may also be noted that the Dutch Code makes a very special and peculiar provision for the case of doubt, that is, if the Court cannot decide which ship or whether both ships are to blame. In this case the total damage to both ships and both cargoes is added together and paid by the aggregate value of both ships and both cargoes, in the same way as General Average is on one ship and one cargo (Art. 538). Hence it may well happen that in a collision for which both ships are really to blame, but in which, from the evidence being equally balanced or other causes, the Court, though certain there is blame somewhere, fails to arrive at a conclusion which incriminates either or both, a valuable cargo, the owner of which certainly was innocent of any art or part in the collision, and whose cargo has not been seriously or at all damaged, may have to pay large sums for the repairs of both ships and compensation to the owner of the other cargo. Also, where a ship at anchor is run down by one under way, even by pure accident, half of the damage done to the ship and cargo at anchor is paid by the ship and cargo under way, being apportioned between these values as General Average (Art. 540).

By recent decisions of the Court of Appeal both owner and captain can further avail themselves of exemption in Bills of Lading for negligence of the crew (15 J.D.I.P. 560, 7 R.I.D.M. 460).

The national policy of our neighbours has always been to foster the shipowning interest, though one may express some surprise that if I have stated the Law correctly, merchants should ship and underwriters insure cargo in Dutch vessels. Probably the answer will be that the Dutch are such good and careful seamen that they do not come into collision, and so the difficulty does not arise.

In *Italy*, in case of both ships being to blame, each of them is liable for the whole damage done to the cargo of either (Art. 662), and exemption of liability for negligence of servants is valid (*C. C. Florence*, 15 J.D.I.P. 554, Trib. Civ. Genoa, 8 R.I.D.M. 418), but not of their barratry (9 R.I.D.M. 82); practically this is the same as in Belgium, France, and Germany.

In *Portugal* the new Code has made a great difference; formerly the letter of the Law was identical with that of Holland, already referred to; now the principle of apportioning the blame between the ships (I. (*a*).) extends also to the liability of the ships and the cargoes, the total damage to both ships and both cargoes is massed together, and the payment apportioned between the two ships in proportion to their respective blameworthiness (Art. 666), whilst in a case of doubt so far from the cargo getting nothing and having very probably to pay heavily, the cargo can recover from either ship. I have not been able to find any decision as to the right of a shipowner contracting himself out of liability, but Art. 708 of the Civil Code would appear to allow it. It says: "Civil Liability may be regulated by agreement, except in cases where the law expressly forbids it." It is true that the Civil Code does not directly apply to Commercial matters, but as such a contract is not forbidden, it would appear to be allowed. It should, however, be noted that by the Commercial Code, contracts are to be interpreted by the *lex loci contractûs*, unless such law is contrary to Portuguese Law or Public Policy (Art. 4 (1)) which might affect the question if the Bill of Lading containing an exemption of negligence was given in a country where such exemption was illegal.

In *Russia* the damage to cargo is assessed on *quasi* General Average principles on both ships (Art. 453), but is payable primarily by the captains of the ships and only when they are exhausted by the owners; in the case of a ship at anchor being run down by one under way, without negligence, the ship at anchor and her cargo recover one half of their damages from the ship under way.

In *Spain* the Law as to cargo damage where both are to blame is the same as in Italy (Art. 827), and in case of doubt the same as in Portugal (Art. 828). It appears to be illegal for an owner to contract himself out of his liability (Art. 620).

In the *Scandinavian States* (Denmark, Sweden, and Norway), under their new and practically identical Codes, no special provision is made as to cargo damage; the whole

matter rests on the discretion of the Court so far as the tort or damage, *ex delicto*, is concerned, but there does not seem to be anything in the Code to prevent the cargo suing the carrying ship on the contract. I have not found any decision as to the validity of the negligence clause; it is not a usual clause, so far as my personal experience goes, in Scandinavian Bills of Lading. As in Germany the remedy in tort against the other ship is against her owners, notwithstanding the ship is demised (Art. 275).

In *Turkey* and *Egypt* there is no express provision as to cargo, but it appears that both ships are liable to both cargoes in proportion to their respective values. It has been decided that an agreement that ship and cargo should each bear its own loss in cases which, under the general Law are General Average, is valid (8 R.I.D.M. 159), and therefore there seems no reason to suppose that a clause, exempting a shipowner from liability for the negligence of his servants, would be invalid.

The *United States* have, although deriving their law originally from Great Britain on this question, widely diverged from its present practice.

The principle laid down in the *Milan* (Lush, 358) about 40 years ago, that only half the damage could be recovered from the other ship, was never accepted in America (*The Atlas*, 3 Otto 302). And a shipowner cannot contract himself out of any liability he may have for the acts of his servants (*Re The Missouri S.S. Co.*, 6 Asp. 264, 433; *Liverpool and Great Western S.S. Co.* v. *Phœnix In. Co.*, 129 U.S. Rep. 397), even where the ship is a foreign vessel in whose country such a contract is legal (*The Brentford City*, 3 R.I.D.M. 364; 29 Fed. Rep. 373), and, indeed, since the decisions of these cases such a contract has been prohibited by legislation (Act of Congress 13.2.93, §§ 1, 2), but the same statute whilst prohibiting the special case practically enacts the general principle, as it lays down (§ 3), that if a shipowner uses due diligence to see the vessel is seaworthy when she starts on her voyage, both he personally and his ship are free from liability for "damage or loss resulting from faults or errors in navigation or in the management of the vessel." Prior to the passing of this Statute it was held that the owner of cargo damaged in a collision for which both ships were to blame, might elect to sue either ship for the whole amount (*The Atlas*, 3 Otto 302; *The Britannic*, 39 Fed. Rep.

395), or might sue both jointly, in which case the judgment should be against each for one half, but should also provide that if the plaintiff fails to recover the whole of one moiety from either, he might recover the balance of that moiety, in addition to the whole of the other moiety, from the other one (*The Alabama* and *The Gamecock*, 2 Otto 695; *The Doris Echhoff*, 41 Fed. Rep. 156), leaving the wrong-doers to settle the matter between themselves (*The Shubert* and *The Einer*, 45 Fed. Rep. 497), but it would appear that under the Statute quoted above, his chance of recovering anything from the carrying ship has vanished, and though the Statute was passed no doubt primarily in the interest of carriers of cargo, there does not seem to be anything in it to limit it to the case of carrying ships; doubtless before long some case, where it is set up as a defence to an action for damage by collision, will find its way to the Supreme Court of the United States, where an authoritative decision will be given on the point. The Statute does not include the case of live animals (§ 7), and probably for this reason, and also for others to be noted hereafter, does not apply to cases of loss of human life or personal injuries.

It would probably be mere waste of time to attempt to classify the Law on a subject as to which the Codes are silent in the various South American Republics, except Argentina and Uruguay, and we may best turn to consider the Law which comes home to everyone of us who attempts the shortest journey by sea, as to what his remedies are if he is injured, or what chance his family has of recovering some compensation should he unfortunately lose his life in a collision for which both vessels are to blame.

(III.) The question is not, as a rule, dealt with in the Commercial Codes, but is governed generally by the ordinary Civil Law, the difficulty as to stating it in any particular case rather arising from the different ways in which different States deal with a question arising on the High Seas between ships of different nationalities from one another, and very probably also different from that of the State into which the ships come, and where the injured person would probably wish to institute proceedings.

As there is a greater degree of uniformity between the Civil Law of the several States in cases where a person is injured or meets his death in consequence of the joint negligence of two parties than in regard to the Maritime Law of Collisions, it will probably be sufficient

here to draw attention to the Law on the subject in France, Great Britain, and the United States, though I hope if the Law of other States materially differs from all of these three we may hear of it. I would only observe here that in only the most recent Codes—Belgium, 1880 (231); Italy, 1883 (661); Spain, 1885 (834—838)—are these claims specifically recognized as giving a privileged claim against the ship or freight; in the two last mentioned the privilege ranks prior to that of damage to property.

In *France* it appears that the relatives of an innocent member of the crew and, *à fortiori*, of a passenger, can recover from either or both shipowners (*Simon Ullander* v. *Louvet*, 2 J.D.I.P 112, and 10 R.I.D.M. 754), whilst as contributory negligence does not in France constitute an absolute defence to an action, but only goes in mitigation of damages, the actual wrong-doer, *e.g.*, the officer who failed to keep a good look-out or gave a wrong order, might also recover something, at all events, from the other ship (*Recuillet et Chemin de Fer du Nord*, D.P., 1885, 1, 433). In the case of passengers and innocent members of the crew they may have contracted themselves out of their rights as against their own ship; but as the English doctrine of common employment has no place in French Law (*Cour de Cassation*, 2 R.I.D.M. 130, 180), in the absence of some special contract, the crew as well as the passenger could recover. A curious feature of French Law bearing on this subject is that an action for personal injuries, as being an action for a breach of a contract, express or implied, should be brought in the Commercial Courts, whilst an action by relatives for loss sustained by the death of a passenger or member of the crew, as being for injury to the estate, should be brought before the Civil Tribunals (C.C. 2 R.I.D.M. 130, 180).

In Great Britain it has quite recently been decided by the House of Lords (*Mills* v. *Armstrong*, 13 Ap. Cas. 1), that as regards the other ship, where a passenger or an innocent member of the crew is killed in a collision where both ships are to blame, their relations, within certain limits prescribed by Act of Parliament, can recover in full, but that anyone who has, by his own voluntary act, contributed to the collision can recover nothing. It is left in doubt still whether a member of the crew who has, in obedience to orders, contributed to the collision can recover or not; for example, a helmsman who has been told to starboard, and does so, when the proper course

would have been to port. Possibly his remedy may lie, not against the other ship, but against the officer who gave the wrong order.

As against their own ship the rights of the passengers' relatives are governed by the conditions of the passenger's ticket, which in all, or almost all, large lines of steamers preclude any liability, whilst the crews, whether innocent or guilty, are precluded by the doctrine of common employment, which, abolished in other trades by the operation of the Employers' Liability Act of 1880, still exists with regard to seamen.

In cases of personal injury the matter cannot be considered as settled. Until some authoritative decision of a Final Court of Appeal is given it must be doubtful whether the Law laid down in *Mills* v. *Armstrong* (*ante*) applies, or whether only half damages, as in the case of cargo (*The Milan*, Lush, 358), only can be obtained from the other ship; as regards their own ship the same rules as in the case of loss of life govern the case. It may be there is a difference between the Law of England and Ireland on the one hand, and that of Scotland on the other, but this depends on questions of Municipal Law, which it would be wearisome to discuss here.

In the United States, so far as I can learn from text-books and published reports of cases, the matter is in a peculiarly unsettled and therefore unsatisfactory condition.

It has been already pointed out that the American Courts of Admiralty have not adopted the British rule as to damages so far as a cargo, necessarily innocent, is concerned. None the less in other matters they have carried the principle of division of damages much further than in Great Britain, and applied it to all Maritime torts (*The Sterling* and *The Equator*, 16 Otto 667; *The City of Hartford*, 7 Otto 323; *The Serapis*, 8 U.S. Ap. Cas. 49), with, however, a possible relaxation where the contributory negligence was very slight or very gross (*The MacMorris*, 30 Davis Sup. Crt. Rep. 1; *Anderson* v. *The Ashbrooke*, 44 Fed. Rep. 124). Applying this principle to the case of collisions, it would appear that in cases of personal injury a member of the crew who had contributed to the collision could recover half his damages from the other vessel; but as the other vessel would have a personal action against him as well as against his owners for half her damages, if such an action were brought, it would in the result only benefit his owners, who would have to pay less by the

amount he had recovered and which the opposing ship would cancel by her claim against the actual wrong-doer.

As regards an innocent member of the crew or a passenger there seems no reason to suppose that their claims for personal injury would differ in principle from those of cargo owners so far as the other vessel is concerned, unless they have been differentiated by § 7 of the Act of 1892 already referred to. As regards their own vessel the same consideration would apply to passengers; with regard to the crew in some of the States the Doctrine of Common Employment is no defence (*Scarff* v. *Metcalf*, 3 R.I.D.M. 627).

With regard to claims for loss sustained through the death of a relative the case is different. There is no Statute of the United States giving a right to any damages in such a case any more than there was in England prior to the passing of Lord Campbell's Act in 1847. Several of the individual States have such Statutes, but the United States or Federal Courts have exclusive jurisdiction over parties responsible for loss of life or personal injuries on board ships at sea (Rev. Stat. U.S., Tit. XIII., ch. 7, § 629 (19)). The whole question has recently been much discussed in the Supreme Court, and it seems now to be decided that the Admiralty Courts have no jurisdiction *in rem*, and that for loss of life in a collision at sea there is no remedy (*The Harrisburg*, 12 Dav. Sup. Crt. 199; *The Alaska*, 23 Dav. Sup. Crt. 201). But that if the injury was inflicted within the territorial limits of a State where it gave a right of action such right could be prosecuted in the Admiralty Court by proceedings *in personam* (*Butler* v. *Boston and Savannah S.S. Co.*, 23 Davis Sup. Crt. 527; *The Corsair*, 38 Dav. Sup. Crt. Rep. 335); and from the last mentioned case it would appear that if the State Law gave a lien for such damage the Admiralty Court could enforce it.

(IV.) As to the limit of liability of shipowners we find again three different rules: First, that of the ship and freight itself, which, when the ship happens to be at the bottom of the sea and the freight is not earned, is not of much value; this limit is in force generally. At the time of the promulgation of the Napoleonic Codes there was much discussion in France as to whether a shipowner should be liable for the negligence of his servants to the whole amount of his property, or the whole amount of his Maritime property, or only to the amount of that portion of it of which the servants were in charge at the

time, and in the result it was settled in the last and most limited degree. This principle, which indeed was that of most Maritime States previously, probably from the difficulty of getting anything more out of a foreigner, and the injustice of treating natives worse than foreigners, has been incorporated into the Codes of almost all nations. Secondly, in Great Britain, for many years prior to 1862, the rule was that though the value of the ship and freight was the limit of liability, yet it was not the ship itself which was considered, but her value at the moment before the collision happened for which amount the shipowners' general property was liable. But in 1862, a different measure was established, namely, the purely empirical one, that where property only was concerned, the shipowner should be liable only for £8 per ton on the tonnage of his ship. An additional liability of £7 per ton was imposed to give compensation for loss of life or personal injury; a difference, not necessary to discuss here, being made between the measurement of sailing and steamships. This arrangement gives an advantage to foreign ships or ships owned singly by a Limited Liability Company, when they are in their damaged state, worth less than £8 or £15 per ton, as the case may be. As in the case of a foreign vessel, the owners of which are resident out of England, and cannot be served with process, the practical measure of damage must be the value of the vessel, whilst in the case of a Limited Company, whose sole property is the ship, it is obvious that no more can be got than the ship herself.*

In *Great Britain* this law of Limited Liability is held to apply to Foreign vessels if the owners can be served with process, and have property which can be taken in execution beyond the ship herself (*The Amalia*, Br. & Lush, 151).

In *France*, on the other hand, the Cour de Cassation has recently held that the British Law of Limitation attaches to the British ship when in collision on the High Seas. That in fact the limitation of a shipowner's liability is not governed by the *lex fori* as in England, but by the Law of the flag (19 J.D.I.P. 153, 1,130; 7 R.I.D.M. 242), whilst it appears doubtful if a British shipowner has any limit at all allowed him for a collision with a French ship in French

* That is, if the ship is uninsured; if she is insured, the well-known "collision clause" would no doubt be present in the policy to protect the Company.

waters* (*Burnett* v. *Abram & Ors.*, 21 J.D.I.P. 303). In *Belgium* the liability is held to be governed by the *lex fori* (8 R.I.D.M. 131).

It is obvious that, whether one ship alone is to blame or both, it is very important to the shipowner to know what his limit of liability is; it may well determine the captain's mind as to the port of distress he will make.

When British Law applies, it is of great importance both to ship and cargo-owners where the damages are large and the value of the ship small, that is, less than £8 per ton, in a case of both to blame, and where each vessel is primarily liable to pay half the damages of the other and of her cargo, to know whether the arbitrary limit of liability is to be applied to the actual claim for half or to the balance ascertained by setting off one ship's half against the other. It is now settled that the latter is the correct plan (*The Khedive*, 7 A.C. 795).

So far as I am aware, only one Maritime State altogether repudiates the idea of limiting a shipowner's liability in any way where collision damage is in question, and that is Portugal, under her new Code (Art. 492 (1)).

It had formerly been argued that, under the Spanish Law, a shipowner was under no liability for the acts of his servants on board ship in bringing about a collision, on the principle for which formerly Bynkershoeck contended, that the act of running down another vessel was no part of the duty which the captain and crew were employed to perform, but whether the contention was well founded or not is now only of archæological interest, as under the existing Spanish Code the liability of shipowners for collision is expressly enacted (Art. 837) up to the value of ship and freight.

There appears to be a curious point in Italian Law, which may largely affect the rights of cargo, in a case where both ships are to blame for a collision. As already pointed out, each ship is, under these circumstances, liable for the whole damage (*ante*, II. Italy), subject to the right of abandoning ship and freight, which is the limit of the owner's liability on the contracts of his master, as in other Continental States; but if the contract of carriage, instead of being a Bill of Lading signed by the master, is made with an agent of the

* At the Conference it was stated that a very recent decision of the Cour de Cassation at Paris had decided that in this case the British ship might claim the French limit.

company owning the ship on shore, there appears to be no limit to their liability, as they cannot in this case free themselves by abandoning or surrendering ship and freight, the case not being provided for in the Commercial Code, and the agent may be sued for the whole damage (4 R.I.D.M. 337; 16 J.D.I.P. 161; 5 R.I.D.M. 558), and, moreover, if successful in such action, any ships belonging to the company, even if the company be not an Italian one, can be taken in execution (2 R.I.D.M. 217; 8 R.I.D.M. 614).

It should also be observed that the right of limitation by abandonment does not apply in Russia (Arts. 253, 255) to tugs, which, where a vessel in tow is brought into collision by the joint negligence of her tug and of the other colliding vessel, may produce the same results both for ships and cargo that the special case above mentioned does for cargo in Italy.

Having now considered the main divergences of the Law of different States as affecting questions of collision where both ships are to blame, let us glance for a moment at the systems of application of these Laws in different States. Where one vessel alone is to blame for a collision, it makes comparatively little difference by what Law the case is decided; the only questions of importance there are the right of arresting the delinquent vessel, and the measure of liability of her owners. The former of these questions has recently been ably dealt with in a series of articles in the *Revue International du Droit Maritime*, and I do not propose to enter upon it here. The latter has been already referred to and has also been treated by Mr. Gray Hill, of Liverpool, in papers read at Plymouth and Norwich in 1891 and 1892.

When, however, both ships are to blame, it is clear that if they are of the same nationality there may be a vast difference in the result, if, on the one hand, their mutual liabilities are to be decided by the Law of their own flag or on the other by that of the country in which the case is tried, whilst if the ships are of different nationalities it might be in the highest degree unjust to apply to each the Law of her own flag. If, for example, a German ship and an English ship, after a collision in the North Sea, take refuge in Antwerp, and after trial are both found to blame, should the Law of the flags be applied to each, the English ship would be condemned to pay half the German's damage, and the German ship could not be ordered to pay anything. It is only necessary to state the case to show that this result would be iniquitous.

The case might be even more complicated if two vessels of different nationalities, after a collision for which both are to blame, take refuge in different countries. In this case we might possibly have examples of all the four leading rules. By what Law, then, are these cases to be decided? The question has occupied the attention of many jurists and congresses on the subject of International Law. On this part of the subject I should say that I am much indebted to Dr. Buzzati's exhaustive work, *L'Urto di Navi in Mare*, published in 1889. Referring to his own Italian Law, he quotes Art. 9 of the Civil Code (Preliminary) as confirming Art. 58 of the Commercial Code, and as showing that the Law of the place of collision is to be applied if the collision takes place in territorial waters, or, if both vessels are of the same nationality, the Law of that nation (p. 48). In *France*, *Valroger* and *Desjardin* state: "That when it is necessary to "decide a case between foreign ships of the same nationality, it "is conceived that as, strictly speaking, no French interest is "concerned, the Judge may refer to the Municipal Law of the "two ships" (*Valroger*, Dr. Mar., Vol. V., § 2,124, *Desjardin*, Dr. Com. Mar., Vol. V., § 1,121).

The Congress on International Law at Antwerp was of opinion that "Collisions at sea between two vessels of the "same nationality, are governed by their Municipal Law" (Acts of Con. Int., Antwerp, p. 145), and this view was accepted by our late distinguished *confrère*, M. Jacobs (*Avant-projet de Loi Mar.*, § 26), and by other jurists (Grasso *L'Urto di Navi*, Vol. XXXIX., p. 222, Gianzana, *Risposta*, pp. 19 and 20. Dr. Rossi and Novi Lena, *Osserrazione sul question III.*, Lebano *Con. Int. di Dir Com.*, § 9. Benfante *L'Urto di Navi*, Pt. III., Ch. V., § 1, p. 250). But Lyon-Caen is of opinion that: "Where out of territorial waters altogether it seems "reasonable to disregard the peculiar arrangement with regard "to doubtful collisions, and to hold the Law common to all "nations which only recognise in collisions either pure accident "or blame on the part of someone; this solution, indeed, "ought to be followed, in our opinion, even when the ships "in collision on the High Seas are both French" (*Etudes Dr. Int. Pr.*, Ch. VII., § 63). Where the collision is on the High Seas between vessels of different nationalities, Labbé, writing in the *Journal du Palais*, 1875, p. 241, and criticising a decision of the Cour de Cassation in Paris, which had applied French Law, the *lex fori*, to a collision

between a French and an English ship on the High Seas, after pointing out objections to that course and also to that of referring to some problematical common Law of the sea, proposes to leave all these cases to the sense of natural equity in the Court. "We propose," he says, "that the Judge "should rely on what is right only without the support of any "positive law. Yes, whilst making a true International Law "applicable to such suits. Is such a course unheard of? "Our legislature itself in requiring the Judge to decide in "cases where there is no positive law, invites him to supply it "out of his sense of right and the Law of nature in absence of written and published texts." *Valroger*, on the other hand, supports the decision of the French Courts in the above and other cases, saying, "the French Law appears to him to be "the only one applicable when the dispute is between "foreigners of different nationalities, and still more so "when between Frenchmen and foreigners, wherever the "collision happened, from the moment that a French Court is "called on to decide it" (J.D.I.P., 1887, p. 734).

Desjardin propounds another plan, as follows :—"The "question is less simple if the two Laws are not alike. It would "be equitable and just in this case to apply the Law of the ship "which is run down. Between the doer of the wrong and "the victim of it I have no hesitation. The running down "ship may certainly if he loses the case be involved in "liabilities beyond what he anticipates; but it is better that "his calculations should be upset than those of the vessel "which is run down. The latter in making his estimate of "the damage is entitled to expect reparation in conformity "with his own Law, and to regulate his proceedings on that "assumption. If indeed it were more to his advantage to "claim by the Law of the running down ship he should not be "allowed to take advantage of it. He cannot claim to be better "than if he had been run down in the waters of his own country "by a ship sailing under his own flag. The legal complexity "is redoubled when the question is of a mixed or doubtful "collision between two ships of different nationalities, "that is to say, if, strictly speaking, neither vessel runs "down, nor is run down. I shall propose to apply in this "last case that Law which is nearest to general principles "of ordinary Law" (*Dr. Com. Mar.*, Vol. V., § 1,121). Seeing the difficulty of this final proposition, as it would be necessary in the first instance to ascertain what were the

general principles of ordinary Law common to all or most nations, *Benfante* (*Urto di Navi*, Pt. III., Ch. II., § I., p. 58) says: "It cannot be permissible to apply a Law which is more advantageous to one of the ships and less to the other, rather recourse should be had to that which occasions the least hardships to both vessels." The Congress at Antwerp adopted a scheme which is again different, as it binds each vessel to pay or receive no more than the Law of its own flag allows, whereas the logical outcome of *Desjardin's* suggestion would be that in cross causes each vessel would be bound as plaintiff, *i.e.*, in so far as it was the sufferer by the Law of its own flag, and as defendant, *i.e.*, in so far as it was the wrong-doer by the Law of the other ship's flag. *Jacobs*, in supporting the Antwerp scheme, confines himself to the case of doubtful collisions, what we call in Great Britain inscrutable fault. He says: "In the case of a doubtful collision there "is no reason for preferring one Law to another, since there is "no blame to cause the balance to lean in either direction. It "is necessary then to find some means to put both ships on an "equal footing. There are two ways of doing this, either to "say that that Law which is most unfavourable to the debtor "shall always apply, or to say, as the (Antwerp) Commission "proposes, that between the two Laws which are in conflict, "the one which is most favourable is to be preferred. "To bring them to the same common denomination, and to "keep the two vessels in collision on an equality it is "necessary to apply to both of them either the higher or "the lower level. On legal principles the lower level is the "one preferable. When a person has come into collision with-"out any fault being shown, and has done more damage than "he has sustained, what right is there to compel him to give "compensation on the higher level?" *Dr. Buzzati* finally proposes still another method of doing justice, that "the two "ships should have one half of the total amount of the damages "divided according to the law of one ship, and the other "half according to the Law of the other ship" (p. 63).

To pass from theory to practice, the plan adopted in Great Britain has at all events the merit of simplicity, acting on the general principle that the right is governed by the Law of the place where it originated, and the remedy by that of the place where it is to be enforced (Story, *Conflict of Law*, § 558), and applying it to the case of collisions we have the facts of the collision governed by the Law of the place, that is, by the

general Law of the sea, and as no one yet has been able to say what is the general Law of the sea upon a variety of points, we assume that it is the same as that Law of the sea adopted by British Municipal Law. Whilst the remedy, that is, the extent of liability, is always governed by our Municipal Law, hence in all cases of collision at sea we cease to be troubled by the Law of the flag, the cases are decided as to merits on our interpretation of the International Rules for Preventing Collisions at Sea, the liability is, on paper at all events, £8 or £15, as already explained.

In *Belgium*, after much discussion, it seems to be now accepted that the Courts will entertain a cause of damage between foreign vessels on the High Seas (18 J.D.I.P. 1010; 20 J.D.I.P. 221), or even in foreign waters (18 J.D.I.P. 269; 20 J.D.I.P. 942, 944); in the first case, it can only be said to be decided that if both vessels are of the same nationality, the Law of the country will be applied as to the incidence of damages (20 J.D.I.P. 221), and in the latter, the Law of the country in whose waters the collision causing the damage took place (8 R.I.D.M. 123), but, in any case, the owner of a vessel found to blame, can free himself from liability by an abandonment of ship and freight in accordance with Belgian Law (20 J.D.I.P. 221), and an action nominally against the captain binds neither him nor the owner personally, but is only available against the ship (8 R.I.D.M. 587). But in all questions relating to foreign ships, the Belgian Courts will do nothing unless it is shown that similar suits relating to Belgian vessels would be entertained in the Court of the foreign ship (20 J.D.I.P. 443; 4 R.I.D.M. 189).

In *France*, it was decided by the judgment of the Cour de Cassation already mentioned, as criticised by M. L'Abbé, that the French Courts would entertain actions for damage by collision in French waters where both ships were foreign, and will decide the case, at all events when the ships are of different nationalities and under different Laws, by the Law of France (19 J.D.I.P. 1,133), and it appears that this is also the case wherever the cause of action arises, even if in foreign territorial waters (19 J.D.I.P. 659). A peculiar rule as to the limit of foreign vessels' liability has already been referred to.

In *Germany* there seems to be no doubt that the Courts, as in England, will entertain a suit for a collision independent of the place where it happens. It has been decided that such a collision happening between foreign vessels in German waters

is decided by the *lex fori*, or German Law (*Reichsgericht*, 16 J.D.I.P. 856; 14 J.D.I.P. 339; 17 J.D.I.P. 332), and it is inferred in these cases that it would be decided by that Law in all cases even if the collision happened in foreign territorial waters, but a recent decision at Hamburg (*Trib. Sup. Hanseatique*, 19 J.D.I.P. 1,037) does not indeed decide, but seems to imply that a defendant brought before a German Court might claim to be tried by his own Law. In a case where one ship was Spanish and the other English, the replication to a defence of compulsory pilotage that it constituted no defence in Spanish Law was held bad (17 J.D.I.P. 332), thus concurring with the British decision in the *Halley* (L.R. 2 P.C. 193), though on somewhat different grounds.

In *Italy*. In cases of collision between foreign vessels in Italian waters, Italian Law has been applied (C.C., Turin, 14 J.D.I.P. 241; C.C., Florence, 17 J.D.I.P. 963), and from the analogy of salvage cases (C.A., Genoa, 2 R.I.D.M. 214; C.A., Messina, 3 R.I.D.M. 766), this would appear to be the case wherever the collision happened. The Law of Italy is, however, in a very unsettled condition, as when the Italian States were amalgamated into the Kingdom of Italy, several kept their own final Courts of Appeal or Cours de Cassation, and the decision of one of these on the interpretation of the Code does not bind the others. Hence, amongst other matters relating to collisions, there are divergent practices in the North and South as to the person before whom a foreign shipmaster must make the depositions necessary to preserve his right of action for collision damage (C.C., Turin, 17 J.D.I.P. 380; C.A., Naples, 3 R.I.D.M. 97); and quite recently the Court of Appeal at Genoa has held against the power of an owner to contract himself out of liability for the acts of the master and crew (9 R.I.D.M. 82), whilst several of the Cours de Cassation have freely allowed it. There are Cours de Cassation at Turin, Florence, Rome, Naples, and Palermo. Possibly, as the Commercial Tribunals have been recently abolished, and a distinguished lawyer is now again Prime Minister, means may be found of crowning the edifice of Italian Unity by giving her not only one Law but some authoritative interpretation of that Law.

In *Spain* it has been decided that the Spanish Civil Court has jurisdiction over collisions where one (S.C. Madrid, 16 J.D.I.P. 144; 19 J.D.I.P. 275; 7 R.I.D.M. 603) or both

(20 J.D.I.P. 506) vessels are foreign, provided the collision takes place in Spanish waters. There does not appear to have been any decision as yet on the new Code as to jurisdiction over a collision between foreign vessels on the High Seas. In the cases above mentioned, Spanish Law was applied, it is however, rather to be gathered from the cases referred to that a Spanish Court would not entertain a cause of collision between foreigners on the High Seas.* As moreover there is no power to arrest a foreign ship prior to judgment, it seems unlikely that such a case would be brought before a tribunal, when in almost every instance the vessel would have gone away before judgment could be enforced against her.

In *Egypt*, the International Tribunals have managed to curtail their jurisdiction in collision cases to the extent that they will not entertain a cause unless the defendant is either actually domiciled or has a branch business—a mere agency is not sufficient—in Egypt (7 R.I.D.M. 599), and as these Courts only have jurisdiction where one or both parties to the litigation are foreigners (*Règlement D'Organisation Judiciaire*, Arts. 9, 10), the practical result is that they can only entertain cases where the claim is by a foreign vessel against one under the Egyptian flag.

In the *United States* of America the Courts, as might be anticipated, adopt generally the British view of the jurisdiction, and refer, at all events when the collision occurs on the High Seas or in American waters, to the same hypothetical General Maritime Law which is, in the absence of other proof, deemed to be the Maritime Law as interpreted by their Municipal Law. It has been pointed out that there are notable divergences between the law of the United States and Great Britain as to liability, and that they are more likely to increase than diminish under the influence of recent legislation.

I have now dealt with the principal points of divergence, leaving out of consideration, for want of time and fear of being wearisome, many other important matters, such as the effect of compulsory pilotage on liability, the degree of adherence to the International Rules required in different countries, and the questions of the differing circumstances

* I was informed at the Conference by a member that he personally was acquainted with a case at Cadiz where the Court had declined jurisdiction in such a case.

under which blame is presumed, or where the onus of proof is laid.

I hope, however, I have drawn attention to the painful conflict of Laws on a matter which concerns not only lawyers and seamen, but every merchant and every traveller, and though in a paper which attempts to deal with the Laws of all civilised nations, I have doubtless made mistakes, I hope those who have listened to the paper, or those who may read it, will forgive the errors and accept the intention which is to show how important it is, that as we have had now for over 30 years one common set of regulations for Preventing Collisions at Sea, we should now have one common rule as to the incidence and limitation of damages for breaking those rules.

F. W. RAIKES.

ABBREVIATIONS USED.

J.D.I.P. = Journal du Droit International Privé.
R.I.D.M. = Revue International du Droit Maritime
D.L. = Dalloz—Lois, &c., of France.
C.C. = Cour de Cassation.
C.A. = Cour d'Appel.
S.C. = Supreme Court.
(Art.—). = Art. of Commercial Code of the State.

II.

SHIPPING GAZETTE AND LLOYD'S LIST.

JULY 26, 1894.

SUPREME COURT OF JUDICATURE.

COURT OF APPEAL.

COLLISION.—THE STEPHANOTIS (S) v. THE HORTON (S).

(Before the Master of the Rolls, Lords Justices KAY and A. L. SMITH, and Captain KNOX, R. N., and Captain PARFITT, Nautical Assessors, July 24, 1894.)

This was an appeal from the decision of the President of the Admiralty Division in an action of collision in which the plaintiffs were the owners of the steamship *Stephanotis*, and the defendants the owners of the steamship *Horton*. The collision occurred in the River Tyne, on the afternoon of March 17, 1893, when the *Stephanotis*, a steamship of 1,045 tons gross register, and manned by a crew of seventeen hands, was proceeding up the river in ballast. The *Horton* is a steamship, belonging to London, of 1,187 tons net, and 1,827 tons gross register, with engines of 180 horse-power nominal, and she was bound from the Tyne to Bilbao with a cargo of coal and a crew of twenty hands.

The case for the *Stephanotis* was that she was keeping well over to the north side of the navigable channel, and was making from two to three knots an hour, the tide being first of the ebb, of from one to two knots' force. Snow was falling heavily when the *Horton* was observed *about 250 yards off*, and well into the buoys known as Smith's Buoys, on the north side of the river, and in such a position as to make it impracticable for the *Stephanotis* to pass up between the *Horton* and the buoys. She thereupon sounded two short blasts and starboarded her helm, afterwards repeating the signal. A short blast was then heard from the *Hor-*

ton, which was seen to be approaching as if under a port helm. The *Stephanotis* kept her helm a-starboard and her engines going full speed ahead as the only means of avoiding a collision, but the *Horton* struck her a heavy sliding blow on the starboard side, doing her such damage that she had to put ashore on the south side of the river to prevent her sinking. The plaintiffs argued that the *Horton* was wrongly navigated on the north side of the river, and that she attempted to cross to the southward when it was unsafe to do so.

The case for the *Horton* was that she was keeping to the south of mid-channel, and going down the river at the rate of about four knots over the ground. In these circumstances, the *Stephanotis* was seen coming up the river, about half a mile away, and bearing right ahead. The *Stephanotis* thereupon blew one blast, to which the *Horton* replied with a short blast, and then ported and steadied her helm. When the vessels were in a position to pass clear port to port, the *Stephanotis* blew two short blasts, and the *Horton*, after replying with one short blast, again slightly ported her helm. The *Stephanotis*, however, blew two more blasts, and as she was then seen to be under a starboard helm, the *Horton's* whistle was blown a short blast, and her engines were set full speed astern; but the *Stephanotis* struck the *Horton*, doing her great damage. The contention of the defendants was that the *Stephanotis* was wrongly navigated on the south side of the channel, and that she improperly starboarded across the *Horton's* bows. Sir Francis Jeune found both ships to blame. He held that when the *Stephanotis* saw the *Horton* in the position she alleged, she ought to have stopped, and certainly ought not to have gone on full speed ahead. The learned Judge also expressed the opinion that the *Stephanotis* had a bad lookout, and observed that there was considerable discrepancy between her story as related in the pleadings and as given in evidence. With regard to the *Horton*, the learned Judge held that when she heard the two first blasts of the *Stephanotis*, and the vessels were approaching each other at something like end on, the *Horton* ought to have stopped and reversed, or at any rate to have stopped. In these circumstances, he

pronounced the *Horton* to blame as well as the *Stephanotis*. The owners of the *Horton* now appealed, it being contended that those who were navigating her were reasonably entitled to expect that the *Stephanotis* would obey the Tyne rule, and go the northward, and that there was sufficient time for the *Stephanotis* to port her helm after hearing the signal of the downcoming ship. It was maintained that the collision was entirely brought about by persistence in starboarding on the part of the *Stephanotis*.

Sir Walter Phillimore and Mr. Butler Aspinall appeared for the owners of the *Horton*, in support of the appeal; Mr. Aspinall, Q. C., and Mr. H. Holman for the owners of the *Stephanotis*.

The Court allowed the appeal, and pronounced the *Stephanotis* alone to blame.

The Master of the Rolls, in giving judgment, said:

The advice which we have received from the gentlemen who assist us is precisely that which struck me the moment I heard the circumstances of this case. The advice to us is that there was time and distance for the *Stephanotis* to have ported after the *Horton* blew one blast, and that the master of the *Horton* might reasonably have expected that he would do so. When the master or pilot of the *Horton* heard the first two whistles which were the beginning of the other man's starboarding, and when at that moment starboarding could have but little effect, he had a right reasonably to suppose that the man who at that moment was starboarding his helm, or was beginning to do so, seeing him there, and being told by him that he was porting, would have ample time and distance, if he did not choose to persist in starboarding, to have put his helm put to port, or to have ceased starboarding, and then they would have gone clear. But he persisted in starboarding. Then comes the question, ought the pilot or captain of the *Horton* to have stopped and reversed, or stopped even at that moment when the other was beginning to starboard? The answer is that his beginning to starboard could hardly have been for the *Horton*, but must have been for some other reason, and

that the master and pilot of the *Horton* might reasonably have supposed that, when if anybody had looked, they must have seen the *Horton*, and must have known that the *Horton* was porting—they had a right to suppose that the *Stephanotis* would stop starboarding immediately, and would have ported her helm. If so, it was not unreasonable and unseamanlike, I think, for the *Horton* to keep on as she did. By the time that two ships' lengths were passed over by the two vessels approaching each other—that is, the time of the second blast—the collision was inevitable. It seems to me that the judgment of the President and the advice of his Trinity masters was too severe. It was requiring men to do what no man ought to be expected to do under such strange circumstances. Therefore, with great deference, I disagree with the severity of their sentence, and think the *Stephanotis* ought to be held solely to blame.

Lord Justice Kay: I also think that the learned Judge has dealt with the master of the *Horton* very hardly indeed. The facts are simple. The *Horton* was going down the River Tyne upon the ebb tide, and the *Stephanotis* was coming up the river against the ebb tide. The learned President has found that the *Horton* was, in fact, upon her own side of the river, south of the mid channel line, and that the *Stephanotis* was also over the mid-channel line, but only a little beyond it, so that the *Stephanotis* was not out of her proper water. They were meeting nearly end on, not quite, because they were a little port to port as they were meeting. The *Stephanotis*, when they were four ships' lengths off, blew two blasts, which meant that she was going to starboard. She did in fact starboard, and the captain of the *Horton* saw that she did, but for a moment he hesitated to think that she could possibly be going to maintain that course, and in that moment of indecision the ships, of course, came nearer to one another. The *Stephanotis* blew two short blasts again, showing that she meant to persist in her starboard course, and he then repeated his one short blast and stopped and reversed his engines. If he was in fault, he was only in fault because he did not stop and reverse

the engines when he first got the intimation that the *Stephanotis* was going to starboard. The rules of the River Tyne are very plain indeed. Rule 19 says that every vessel under weigh, proceeding seaward shall keep to the south of mid-channel, and vessels going up the river shall keep to the north of mid-channel. The 22d Rule says that steam vessels proceeding in opposite directions and approaching one another shall keep on their proper side, and, if necessary, slacken speed—vessels going against the tide in all cases giving way to one going with the tide. When steamships approach so as to cause risk of collision, they are immediately to port, and, if necessary, the engines are to be stopped and reversed. The *Stephanotis* disobeyed every one of these rules. I confess I think that the master of the *Horton* is to be forgiven if he could not believe, and did not believe, that she meant to persist in crossing his bows, as it was indicated by the first two short blasts that she might be intending to do. He did not believe at once that she intended to persist in that, and it is, I think, very clear, as our nautical assessors advise us, that there was time for the *Stephanotis* to have altered that intention. She was coming up against the tide, thoroughly under command of her helm, and after she heard that one blast given by the *Horton*, if she had altered her intention and changed her course, as she might then have done, there would have been no collision. If she had stopped and reversed, the collision might have been prevented even at the last moment, but she did nothing of the kind, and persisted in this extraordinary maneuver. She did not stop and reverse, and it seems to me that the fault was entirely hers. It is not a question, as the Master of the Rolls said, whether the master of the *Horton* did the best thing that could have been done, but whether he was guilty of any want of seamanship. We are advised, and it certainly seems to me, that he is not to blame, under the circumstances, for doing what he did. The *Stephanotis* was solely to blame, and the master of the *Horton* ought to be absolved.

LORD JUSTICE A. .L SMITH: There can be no doubt in this case that those in charge of the *Stephanotis* were to blame. Nobody says they were not. The learned Judge says they were, and there is no appeal against that finding. But it is said that those in command of the *Horton* are also guilty of neglect, and guilty of faulty and bad seamanship in not stopping and reversing at an earlier period. It is said that when those on board the *Horton* heard the first two blasts which came from the *Stephanotis*, the captain and those in charge of the *Horton* should then and there have made up their mind that the *Stephanotis* was going to perform the act which she did. The nautical assessors advise us that if the *Stephanotis* had not persisted in the manoeuver that she did persist in, and had gone back to port helm, everything would have gone well. Therefore, in my judgment, there is no negligence on the part of the *Horton* in not having made up her mind instantly that the *Stephanotis* was going to act as she did. In my judgment it has not been made out that the *Horton* has been guilty of negligence, and therefore the *Stephanotis* should be held solely to blame.